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Supreme Court, U.S.
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In The
Supreme Court of the United States

ELEPHANT BUTTE IRRIGATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

HUBERT & HERNANDEZ, P.A.
LEE E. PETERS
Counsel of Record
STEPHEN A. HUBERT
P.O. Drawer 2857
Las Cruces, New Mexico 88004-2857
(575) 526-2101

Attorneys for Petitioner
Elephant Butte Irrigation District

JAMES M. SPEER, JR.
300 E. Main Street, Suite 1440
El Paso, Texas 79901
(915) 534-7393

Attorneys for Petitioner
El Paso County Water Improvement
District No. 1 of Texas

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This case involves the relationship between contracting parties under federal reclamation laws and the crediting of revenues earned from the leasing of reclamation project lands to others. The following questions are presented:

1. Whether the circuit court met its obligation to determine its subject matter jurisdiction over the case before rendering decisions on the merits of the substantive issues presented.

2. Whether two uniquely worded reclamation statutes, 43 U.S.C. 501 and 43 U.S.C. 423f, interpreted in conjunction with general reclamation law and in the context of contractual relationships, impose any requirement upon the Secretary of the Interior to attempt to earn revenue credits for the Secretary's reclamation partners, irrigation districts, from the leasing of reclamation project lands.

LIST OF PARTIES

Petitioners:

Elephant Butte Irrigation District
El Paso County Water Improvement District No. 1

Respondents:

United States Department of the Interior
Dirk Kempthorne, Secretary of the Interior
William E. Rinne, Acting Commissioner of Reclamation
Rick Gold, Regional Director of the Bureau of Reclamation
Joanna Prukop, Secretary, New Mexico Energy, Minerals and Natural Resources Department
Bill Richardson, Governor of the State of New Mexico

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners Elephant Butte Irrigation District (of New Mexico) and El Paso County Water Improvement District No. 1 (of Texas) petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-18) is reported at 538 F.3d 1299. Earlier opinions of the court of appeals (App., *infra*, 19-37) are reported at 269 F.3d 1158 and 160 F.3d 602. The opinion of the district court (App., *infra*, 81-98) is unreported. Earlier opinions of the district court (App., *infra*, 38-58 and 59-80) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2008 (App., *infra*, 100-101). A petition for rehearing was denied on September 16, 2008 (App., *infra*, 99). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

43 U.S.C. 390uu provides:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

Subsection I of the 1924 Fact Finder's Act, 43 U.S.C. 501, in relevant part, states:

> Whenever the water users take over the care, operation, and maintenance of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on

> account of project construction charge, second, on account of project operation and maintenance charge. . . .

The relevant provision of the 1926 Omnibus Adjustment Act, 43 U.S.C. 423f, provides:

> The purpose of sections 423 to 423g and 610 of this title is the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis, and the Secretary of the Interior is directed to administer said sections to those ends.

STATEMENT

1. Congress enacted the Reclamation Act, 43 U.S.C. 372, *et seq.*, in 1902 in an effort to promote settlement of the Western United States. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958). The federal government would design and construct reclamation projects, including dam, diversion facilities and irrigation structures and then contract with irrigation districts for the delivery of water. *Elephant Butte Irrig. Dist. v. U.S. Dept. of Interior*, 269 F.3d 1158, 1160 (10th Cir. 2001) ("*EBID II*"). The farmers put the water to beneficial use on their fields, thereby acquiring the water right under state law. *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The federal government is simply the carrier and distributor of the water. *Ickes v. Fox*, 300 U.S. 82 (1937). Congress was responding to the problems with privately funded

irrigation projects, which tended to attract large or corporate investors instead of family farmers. The Reclamation Act was intentionally designed to benefit the small, family farmer, and to extend its benefits to the largest number of people. *Ivanhoe*, 357 U.S. at 292.

The Reclamation Service thus began the process of planning and building large irrigation projects in most Western states. Farmers settled in these projects and populations grew. The Reclamation Service would typically require the farmers to organize into an irrigation district, or similar entity, and then contract with the district for delivery of the water stored by the United States. There were generally two primary components of those contracts, repayment in installments of the project construction costs chargeable to irrigation and payment of the annual operation and maintenance charges incurred by Reclamation. This type of contractual arrangement was reviewed and approved by the Supreme Court in *Swigart v. Baker*, 229 U.S. 187 (1913).

As designed by Congress, the Reclamation fund would be a revolving fund that would finance future projects. *EBID II*, 269 F.3d at 1160-1161. The proceeds of sales of federal lands, made attractive to settlers due to the availability of water, would also augment the fund. *Id.* However, within a decade or so several projects were in trouble, particularly with farmers not being able to make their regular construction cost repayments to the federal government. *Id.* Since this had become an endemic problem,

Congress appointed the Fact Finder's Committee in the early 1920's. *Id.* That Committee traveled to several projects in the West, studied the problems, and issued a report containing its findings and recommendations. *Id.* Key among the latter was making additional sources of revenue from project lands and resources available to the farmers and irrigation districts, as the projects' beneficiaries, for repayment of the construction debt to the United States. *Id.* Without additional revenues, the Fact Finder's Committee believed a significant number of projects would fail. Sen. Doc. No. 68-92, at xi (1924). The Committee feared that the reaction to failing reclamation projects would be federal government takeovers and "a dependence on Federal paternalism." *Id.* at xiii.

> The water users have come to look upon themselves as wards of the Government . . . and the Reclamation Service has been tempted to accept this definition of the water users. Nothing could be more detrimental to the progress of a venture which demands, first of all, individual courage and independence of the people concerned. . . . [T]he operation and maintenance of the project may be turned over to the water users. This should be done at the earliest possible date.

Id.

As a result of the report and recommendations, Congress in 1924 adopted the Fact Finder's Act, 43 Stat. 672. This Act provided a comprehensive solution

to the problems of many of the Western projects. A key provision was made in Subsection I of the Act, which was codified at 43 U.S.C. 501 (hereinafter referred to as "Subsection I"), which provided for the disposition of revenues earned from project lands. When a reclamation project is taken over by an irrigation district, the Secretary of the Interior is required to determine the "total accumulated net profits" and allocate them according to the statutory direction. While the government is still owed project construction charges, the "net profits" must be credited to the benefit of the water users toward that debt. After the construction payoff, the "net profits" must be determined annually by the Secretary and credited by him toward the water users' ongoing project operation and maintenance charges. 43 U.S.C. 501. Congress designed this in order that:

> [T]he water districts would be able to retain certain of the profits garnered by the irrigation projects rather than having to return all profits to the reclamation fund. The goal was to make both the water districts and the reclamation fund solvent.

EBID II, 269 F.3d at 1161.

The Reclamation Act always contemplated the turnover of the projects to the water users, once construction charges were paid off. *Swigart v. Baker*, 229 U.S. at 197-198. The Fact Finder's Act encouraged that to happen sooner, in order that the water users take responsibility for the projects and the government be relieved of it. *EBID II*, 269 F.3d at

1161. The water users had to have part of the net profits of the projects' lands in order to do so. *Id.* With these, the water users could pay off the government sooner and remain financially solvent on their own.

"Net profits" under Subsection I are derived in part from "the leasing of project grazing and farm lands." 43 U.S.C. 501. These are lands that were acquired from private ownership and reserved from the public domain for the specific purposes of the project. *Swigart v. Baker*, 229 U.S. at 196-197. Many of these lands are not needed for reclamation purposes and are leased by the Secretary to others.

Frustrated by the Reclamation Service's failure to carry out congressional policy regarding reclamation projects, Congress followed the 1924 Fact Finder's Act with the 1926 Omnibus Adjustment Act. Cong. Rec. H1547-1551 (1926). Here, Congress charged the Secretary with the duty to run reclamation projects on "a sound and operative business basis." 43 U.S.C. 423f. Therefore, in addition to requiring the Secretary to manage excess project lands with an eye to earning a "profit," Congress imposed a businessman's standard on the Secretary's actions. All this met Congress' goal to make successful both the reclamation program and the individual projects, along with all their farmers.

The Fact Finder's Act and the Omnibus Adjustment Act, of which Subsection I and 43 U.S.C. 423f are parts, marked a substantial change in the direction of reclamation of the West. While the earlier

provisions in the Reclamation Act gave great discretion to the Secretary of the Interior, Congress found the Reclamation Service was not following its policies and found it necessary to impose stricter standards on the Secretary's subsequent actions. Credits to the water users under Subsection I were seen by Congress as not only essential to pulling failing projects out of the crisis in the 1920's but also to put water users in those projects on a solid financial footing for "insuring their future success." 43 U.S.C. 423f.

2. The Rio Grande (Reclamation) Project was one of the first in the nation, authorized by Congress in 1905. 33 Stat. 814 (1905). This Project is unique in that the reservoir and water conveyance system serve not only two States (New Mexico and Texas) but also the Republic of Mexico. Each State has a water users' group, an irrigation district functioning as a governmental entity and formed under state law, to deliver water within its boundaries. *Elephant Butte Irrig. Dist. v. Dept. of the Interior*, 160 F.3d 602, 605-606 (10th Cir. 1998) ("*EBID I*"). Since Elephant Butte Reservoir stores water under an international treaty for Mexico, the United States will likely never turn over the reservoir's ownership and operation to the water users. Thus, about 25,000 acres of Project lands surrounding it will always remain in federal management.

The Irrigation District Petitioners formed in the early part of the 20th century and have entered into successive contracts with the United States for delivery of water from storage at the Reservoir. The most

important contracts to this case are those signed in 1937 (hereinafter "the 1937 Contracts"). *EBID I*, 160 F.3d at 606. Each Irrigation District conveyed to the United States its interest in the undeveloped power privilege at Elephant Butte Dam in exchange for a fixed dollar reduction in its construction debt and "the benefits accorded under Subsection I." *Id.*

> The primary benefit under this provision is the right to credit for accumulated net profits derived from various uses of the Rio Grande Project lands.

Id. After 1937, the Bureau of Reclamation developed basic recreational facilities at both Elephant Butte and Caballo Reservoirs on surplus Rio Grande Project lands surrounding those lakes. *Id.* The Irrigation Districts received credits from the net profits derived from these activities until the Bureau entered into a 50-year lease with the State of New Mexico in 1964. *Id.* This lease was reissued in 1973 for another 50 years. These leases not only turned over to the State all revenues from new recreation facilities and uses of Project lands but also transferred existing recreational revenue streams. *Id.* Since the State makes only a token payment to the Interior Department under the lease and is allowed to retain all other revenues generated, the Irrigation Districts will never see "net profits" from these extensive uses of Project lands and resources.

The Irrigation Districts paid off their construction debt in the 1970's and between 1979 and 1981

they took over operation and maintenance of most of the irrigation facilities within the Districts' boundaries. *Id.* Since the Interior Department would not return title to the irrigation systems, the Districts obtained relief from Congress and received deeds from the United States in the mid-1990's. Pub. L. No. 102-575, Sect. 3301-3303; 106 Stat. 4600 (1992).

3. EBID filed suit directly against the federal and state defendants in early 1990. Eventually, six overlapping counts were raised. Count I dealt with the Districts' entitlement to Subsection I revenue credits. Count II challenges the validity of the recreation leases with the State of New Mexico. Count VI dealt with the turnover of management of Project grazing lands, not used for recreation, to the federal Bureau of Land Management. EBID added the El Paso County Water Improvement District as an involuntary plaintiff after filing suit.

The primary thrust of the Irrigation Districts' lawsuit, after establishing their general right to Subsection I revenue credits from Project lands, is to receive credits from the extensive and valuable recreational use of the Project lands adjoining the lakes. The State Parks at Elephant Butte and Caballo Reservoirs attract some two million people per year. The Districts have received nothing from these recreational uses in the almost half century since the Secretary of the Interior gave away the lease to the State.

This case has had a stop and start history, with three appeals to the Tenth Circuit Court of Appeals. Discovery was allowed early in the case but was basically precluded since the first appeal was taken in 1997. All decisions by the district court have been made on motions for summary judgment.

The Honorable Howard Bratton, district judge, granted partial summary judgment to the Irrigation Districts in 1992, ruling that they are entitled to credits under Subsection I derived from "net profits from the 'leasing of project grazing and farm lands'". App., *infra*, 58. Several years later, Judge Bratton granted the Irrigation Districts partial summary judgment on Count II, and found that the lands included in the recreation lease to the State "historically constituted grazing and farm lands of the Rio Grande Project, and the Project was historically credited with the 'net profits' from these lands". App., *infra*, 67. Based upon a 1967 legal opinion by the Interior Department's own solicitor, he also found that the Irrigation Districts are "entitled to continue receiving Subsection I credits, at least credits equivalent to what they were previously entitled to prior to the development of the recreational facilities." App., *infra*, 74. The court stated that a hearing would be set to "reform the lease to provide the Plaintiffs with revenue credits as mandated by Subsection I". App., *infra*, 74.

4. An order in 1993 was appealed by the State of New Mexico on Eleventh Amendment immunity grounds. This resulted in the first of three Tenth

Circuit Court of Appeals opinions in this case. *Elephant Butte Irrig. Dist. v. U.S. Dept. of Interior*, 160 F.3d 602 (10th Cir. 1998) ("*EBID I*"). Judge Bratton entered judgment on Counts I, V and VI in 1999. This judgment was appealed and the Tenth Circuit affirmed in *Elephant Butte Irrig. Dist. v. Dept. of the Interior*, 269 F.3d 1158 (10th Cir. 2001) ("*EBID II*"). The circuit court affirmed the lower court rulings on the Districts' right to receive Subsection I revenue credits under Count I. It also affirmed the dismissal of Count VI's challenge to the Reclamation-BLM management agreement.

By the time the case returned to the district court for trial, Judge Bratton had passed away and the Honorable James Parker was assigned. The district court then invited the federal defendants to file new summary judgment motions on issues already ruled upon. App., *infra*, 4. Judge Parker then took an entirely different direction than had Judge Bratton before him. Judge Parker entered a series of orders under Count II, which ultimately resulted in a Final Judgment of a little over $9,000.00 to the Districts as their recompense for almost 50 years of the State's use of over 25,000 acres of prime recreational land. While nominally agreeing with the prior ruling of the predecessor court, the district court entered successive rulings rendering Subsection I and the Omnibus Adjustment Act virtually meaningless. The district court ruled that the Secretary of the Interior has complete discretion to manage Project lands in any way he sees fit and that he is not constrained by the

specific language of these two Congressional enactments. App., *infra*, 92-95. The circuit court agreed. App., *infra*, 12-15. Ultimately, the $9,000.00 judgment of revenue credits from net profits came about as a matter of happenstance and not any real effort by the Secretary to earn a return for the Irrigation Districts on their investment in the Project lands. App., *infra*, 5. The district court reformed the recreation lease between the Interior Department and the State of New Mexico, but only to provide that if net profits happen to result, the Irrigation Districts are entitled to credits from them. *Id.*

5. The Tenth Circuit Court of Appeals affirmed the district court. *Elephant Butte Irrig. Dist. v. U.S. Dept. of the Interior*, 538 F.3d 1299 (10th Cir. 2008). App., *infra*, 1-18. The circuit court failed to address the issue of sovereign immunity and subject matter jurisdiction under 43 U.S.C. 390uu, which was expressly raised by the federal defendants for the first time at the appellate level. The circuit court agreed with the trial court that "the Districts waived any contract claim" they had. *EBID III*, 538 F.3d at 1304 n.2. The circuit court did not address the subject matter jurisdiction which would be necessary in order to affirm the district court on the reformation of the recreation lease, as well as its affirmance of the district court's prior ruling as to the validity of the grazing lease agreement under Count VI. *EBID II*, 269 F.3d at 1165-1167.

The circuit court found no duty on the Secretary of the Interior to act in the interests of the Irrigation Districts regarding his management of Project lands. It extrapolated the logic from its affirmance of the district court on Count VI in *EBID II*, that the combination of Subsection I and 43 U.S.C. 423f do not create a fiduciary duty upon the Secretary to generate profits from Project lands. Since the matter is "a question of pure statutory interpretation", the circuit court explained, the Secretary "either has a duty under the acts to generate profits or . . . not, regardless of the type of lease." *EBID III*, 538 F.3d at 1305. The circuit court, like the district court and the federal defendants, never provided an interpretation of what the unique language of these laws indeed means.

In almost two decades, no court has heard the essential claim raised in Count II of this case by the Irrigation Districts, whether the Secretary of the Interior properly considered the Districts' statutory and contract rights when the Secretary leased away 25,000 acres of Project lands for recreation for no consideration.

6. EBID filed a petition for panel rehearing with the circuit court, emphasizing the failure to determine subject matter jurisdiction. This petition was denied. App., *infra*, 99.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals Failed to Follow Supreme Court Precedent by Ignoring Its Basic Requirement to Determine Its Own Subject Matter Jurisdiction

A basic requirement of any federal court is the determination of its own jurisdiction to hear a matter. Federal courts are courts of limited jurisdiction, so subject matter jurisdiction is a court's first concern. An appellate court's first duty is to ensure that it does not use federal judicial power in a case to which the laws of the United States have not extended that power. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

A federal appellate court has the obligation to determine that it has subject matter jurisdiction, as well as the court below, even if none of the parties raise it. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Jurisdictional defects can be raised to a federal court at any time, even on appeal. *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991). Subject matter jurisdiction cannot be waived or conferred by consent or by the failure to challenge jurisdiction early in the case so the court has the duty to determine jurisdiction sua sponte. *Atlas Life Ins. Co. v. W.I. Southern Inc.*, 306 U.S. 563, 568 (1939).

A court has no authority to decide a case on the merits where it lacks subject matter jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). If the court lacks jurisdiction of the

subject matter, it is required to dismiss the case. *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379, 382 (1884). A judgment is void if the court that entered it lacks subject matter jurisdiction.

During the course of the case, this Court decided *Orff v. United States*, 545 U.S. 596 (2005), interpreting 43 U.S.C. 390uu. The Court affirmed the Ninth Circuit Court of Appeals in dismissing a longstanding action involving a reclamation contract since there was no waiver of immunity under this statute:

> The statute does not waive immunity from suits directly against the United States, as opposed to joinder of the United States as a necessary party defendant to permit a complete adjudication of rights under a reclamation contract.

545 U.S. at 604. The present case is procedurally similar to *Orff*. The federal defendants were not joined to an existing case, but EBID sued them directly.

While the Tenth Circuit explained its lack of review of subject matter jurisdiction by agreeing with the district court that the Irrigation Districts had waived any claim they had regarding their 1937 Contracts with the United States, that conclusion cannot end the jurisdictional inquiry. In *EBID III*, the circuit court affirmed the lower court's reformation of the recreation lease between the Interior Department and the State of New Mexico, which is clearly a

"contract executed pursuant to Federal reclamation law." 43 U.S.C. 390uu. Additionally, in *EBID II* the circuit court affirmed the district court's validation of the agreement between two federal agencies regarding administration of grazing lands on Rio Grande Project lands. This is another "reclamation law" contract.

Regardless of the disposition of the issue raised by the Irrigation Districts regarding their 1937 Contracts, both the district court and the circuit court were required to determine their jurisdiction to have modified or approved contracts made under federal reclamation law. Neither the district court nor the court of appeals made any examination of its jurisdiction to proceed with this case after the issue was belatedly raised by the defendants. These lower courts did not simply misapply a clear rule; they ignored their obligation to apply it. This failure resulted in a serious misinterpretation of federal Reclamation law on the merits of the appeal below.

A significant ruling on the meaning of important and unique Reclamation statutes should only be made after the lower courts acquire subject matter jurisdiction.

B. The Court of Appeals Fundamentally Misinterpreted Federal Reclamation Law and Rendered Two Unique Federal Reclamation Statutes Meaningless

The two reclamation statutes at issue here were given significant meaning by Congress, but the interpretations by the court of appeals have stripped away any such meaning. The lower courts effectively destroyed Congressional intent expressed through Subsection I and 43 U.S.C. 423f. The simplistic analysis given these laws by the court of appeals ignores the specific language Congress used and the purposes Congress had in mind in enacting these laws.

These two reclamation statutes are remedial in nature and should be given a broad interpretation in order to carry out Congress' intent. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991). The legislative history clearly shows that Congress spoke with specific meaning in these statutes. Probably the most obvious indicator of specific meaning was the unique language used in each statute. Courts should ascertain the meaning of older statutes by considering contemporaneous interpretations. *California v. United States*, 438 U.S. 645, 648 (1978).

Subsection I uses the term "net profits" in requiring that the Secretary of the Interior determine how much they are. There is no other existing federal statute that requires an executive agency to earn or determine net profits. 43 U.S.C. 501 is the only

statute in which this phrase appears in regard to a duty or responsibility of a federal agency. When considered in its context, "the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, . . . shall be credited . . . , and thereafter the net profits . . . may be used by the water users to be credited annually," it is apparent that Congress meant for the Secretary to do something to make them happen other than rely on serendipity. If Congress had not intended some responsibility upon the Secretary, it would not have selected this unique term.

When the Secretary did not respond appropriately to the 1924 enactment, Congress followed in 1926 with a specific directive for him to "administer . . . the several reclamation projects . . . upon a sound operative and business basis." 43 U.S.C. 423f. The latter phrase is also unique to federal statutes and cannot be assumed to have been inserted by Congress without reason. The combination of these phrases in the same group of statutes and serving the same purpose indicates a Congressional directive that the Secretary take affirmative action.

When the Irrigation Districts entered into the 1937 Contracts they were assured by the United States that "the benefits of Subsection I" provided adequate consideration for the exchange of the valuable power privilege at Elephant Butte Reservoir. This means that the federal government's contemporaneous interpretation of the governing statutes,

about a decade old at the time of the 1937 Contracts, was substantially different than its current view.

Congress had specific reasons for its 1920's amendments to the Reclamation Act and the courts should interpret these amendments liberally in order to accomplish Congress' purposes. The court of appeals incorrectly took the opposite approach by constricting Congress' meaning and not properly applying statutory construction tools. The court of appeals also misinterpreted Congressional intent. Even though the court of appeals affirmed the district court, Judge Bratton, on his distinction between Counts II and VI in *EBID II*, it affirmed the district court, Judge Parker, when he found no distinction between the Secretary's responsibilities in *EBID III*. The court of appeals' interpretation of Congressional intent runs contrary to its actual purpose. The court of appeals in *EBID III* approved the district court's finding that the duty of the Secretary under Count II regarding lands leased for recreation is the same as his duty under Count VI regarding lands leased for grazing. 538 F.3d at 1304-1305. It relied upon its earlier opinion and the rationale that "[w]e do not believe that Congress was attempting to put the water districts under the protective care of the DOI, but rather was simply trying to find a way to help the water districts repay the money that they owed the federal government." *EBID II*, 269 F.3d at 1167.

This analysis is backwards and contradicts the court's own opinion, since Congress clearly intended the "water districts [to] be able to retain certain of the

profits garnered by the irrigation projects". *Id.* at 1161. The effect of the court of appeals' analysis is to strip the Irrigation Districts of the very revenues Congress intended they have. For example, had the Secretary negotiated a fair lease rental with the State of New Mexico in 1964 and credited those annual rents to the Irrigation Districts, they would have been able to pay off their construction debt sooner and become more solvent. Instead, the court of appeals finds no responsibility upon the Secretary except to mechanically produce annual accountings. Since the farmers in the Irrigation Districts paid for the very lands that the Secretary is leasing (and since the farmers own the water rights being stored in the lakes), Congress intended that they receive some sort of return on them. Otherwise, Congress would not have used the unusual (for government) term "profits" and imposed a business standard upon the Secretary's actions.

The court of appeals failed to follow standard statutory construction principles. Federal courts must give meaning to the specific language used by Congress. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 248 (1994). A court cannot omit or ignore particular words in a statute. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). It must give effect to all of the words used by Congress. *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007). Unique or unusual language implies specific meanings. *United States v. Ahlers*, 305 F.3d 54, 60 (1st Cir. 2002). A court must look not only at

the particular language of a statute but also to the design of the statute as a whole and its object and policy. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

While this case may be the first significant interpretation of these two statutes by a court of appeals, a split in the circuit courts may never occur. This court of appeals decision will likely be the only circuit level opinion on these critical issues. Reclamation projects are almost exclusively located in the Western states, within the Ninth and Tenth Circuits. Within these circuits the interpretation of reclamation laws is important and affects a number of large projects, particular the pre-1937 ones. Western irrigation districts have an ongoing relationship with the Department of the Interior in the management of reclamation project lands. This decision of the court of appeals would obliterate any returns from project lands to those who have paid and continue to pay for them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HUBERT & HERNANDEZ, P.A.

LEE E. PETERS
Counsel of Record
STEPHEN A. HUBERT
P.O. Drawer 2857
Las Cruces, New Mexico 88004-2857

Attorneys for Petitioner
Elephant Butte Irrigation District

JAMES M. SPEER, JR.
300 E. Main Drive, #1440
El Paso, TX 79901

Attorneys for Petitioner
El Paso County Water Improvement District No. 1 of Texas

APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO, and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 OF TEXAS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; WILLIAM E. RINNE, Acting Commissioner of Reclamation; RICK GOLD, Regional Director of the Bureau of Reclamation, ANITA LOCKWOOD, Secretary of the State of New Mexico; GARREY CARRUTHERS, and Governor of the State of New Mexico,

Defendants-Appellees.

No. 06-2282

(Filed Jul. 24, 2008)

Appeal from the United States District Court for the District of New Mexico (D.C. No. CIV-90-95-JP/KBM)

Steven Hernandez of Hubert & Hernandez, P.A., Las Cruces, New Mexico, and James M. Speer, Jr., El Paso, Texas (Joshua A. Myers, Lee E. Peters and Stephen A. Hubert of Hubert & Hernandez, P.A., Las Cruces, New Mexico; and Timothy J. DeYoung of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, with them on the briefs), for Plaintiffs-Appellants.

Kathryn E. Kovacs, U.S. Department of Justice, Environmental & Natural Resources Division, Appellate Section, Washington, D.C. (Matthew J. McKeown, Acting Assistant Attorney General, U.S. Department of Justice, Washington, D.C.; and Gary K. King, Attorney General, and Christopher D. Coppin, Assistant Attorney General, State of New Mexico, Albuquerque, New Mexico, with her on the brief. Chris Rich, U.S. Department of the Interior, Salt Lake City, Utah; and John W. Zavitz, Assistant United States Attorney, Albuquerque, New Mexico, of Counsel), for Defendants-Appellees.

Before **KELLY**, **SEYMOUR** and **MURPHY**, Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiffs Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas (collectively the Districts) appeal the district court's final judgment on the only remaining count in this case, Count II of the complaint. On a summary judgment motion, the court held in favor of defendants, the United States Department of the Interior and various federal officials (collectively DOI). For the reasons explained below, we affirm.

I

The facts of this case have been set forth thoroughly in both *Elephant Butte Irrigation Dist. v. Dep't of the Interior,* 160 F.3d 602 (10th Cir. 1998) ("*EBID I*"), and *Elephant Butte Irrigation Dist. v. Dep't of the Interior,* 269 F.3d 1158 (10th Cir. 2001) ("*EBID II*"). In particular, *EBID II* describes the historical and legislative background of reclamation law and the authorization of the project at issue. We discuss only those facts relevant to our consideration of Count II.

The Districts filed a complaint in 1990, challenging, *inter alia,* DOI's distribution of certain revenues from the Rio Grande Reclamation Project (the project). As relevant here, Count I alleged that the Districts were entitled to the revenues listed in Section 4-I of the Fact Finder's Act of 1924, 43 U.S.C.

§ 501 (Section 4-I). Count II challenged DOI's lease of project lands to the State of New Mexico for recreational purposes and sought an order reforming the lease to provide the Districts with profits generated under the lease pursuant to Section 4-I. Count VI similarly alleged that a Memorandum of Understanding by which DOI leased project lands to the Bureau of Land Management for grazing was unlawful because it would return no profit to the Districts.

The district court granted summary judgment in favor of the Districts on Count I, and in favor of DOI on Count VI. The district court also granted the Districts' motion for partial summary judgment on Count II, but held that disputed issues of fact remained to be decided. It then entered final judgment on Counts I and VI under FED. R. CIV. P. 54(b). This Court affirmed on both Counts I and VI, holding that the Districts were entitled under Section 4-I to profits from the leasing of project grazing and farm land, but that the Bureau of Reclamation (BOR) had no duty "to administer and manage the water project lands in such a way that profits are generated." *EBID II,* 269 F.3d at 1166.

After the decision in *EBID II* and the death of the presiding district judge, the district court invited DOI to renew its motion for summary judgment on Count II. Thereafter, the court granted in part and denied in part DOI's renewed motion for summary judgment on Count II, holding that the Districts are entitled under Section 4-I to any profits arising from the recreation lease, but that the recreation lease had yielded no

profits. The court further concluded that under the holding of *EBID II,* DOI has no obligation to generate such profits. The court issued an order reforming the recreation lease with the State of New Mexico to provide the Districts with any profits generated by the lease. After an accounting, the court entered a final judgment for the Districts in the amount of $9,009.19, representing the net profit it determined they were owed.

The Districts filed a motion for reconsideration, asking the district court to review Count II under their theory that the recreation lease violated the United States' covenants of good faith and fair dealing in the contracts it had entered into with the Districts in 1937 (1937 Contracts). The court declined to address the contract theory, concluding the Districts had failed to timely raise the issue. The court denied a further attempt to raise the contract argument in the Districts' follow-up motion for clarification of the court's order denying reconsideration.

On appeal, the Districts' contend the district court erred in refusing to consider their contract theory of recovery for Count II and in holding that DOI has no duty to generate profits from the recreation lease. They also maintain that disputes of fact and the law of the case doctrine precluded the district court from deciding the merits of Count II on summary judgment.

II

We review the district court's denial of the motion to reconsider for abuse of discretion.[1] *See Geddes v. United Staffing Alliance Employee Med. Plan,* 469 F.3d 919, 928 (10th Cir. 2006) ("Whether to allow supplemental briefing on a newly-raised issue is a 'supervision of litigation' question we review for abuse of discretion."); *Price v. Philpot,* 420 F.3d 1158, 1167, 1167 n.9 (10th Cir. 2005) (reviewing denial of motion for reconsideration for abuse of discretion). "A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Nova Health Sys. v. Edmondson,* 460 F.3d 1295, 1299 (10th Cir. 2006) (internal quotations omitted). We review de novo both the district court's statutory interpretation, *Paper, Allied-Industrial, Chemical & Energy Workers v. Continental Carbon Co.,* 428 F.3d 1285, 1293 (10th Cir. 2005), and its grant of summary judgment, *Occusafe, Inc. v. EG&G Rocky Flats, Inc.,* 54 F.3d 618, 621 (10th Cir. 1995).

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[1] The Districts contend our review is *de novo,* analogizing to a dismissal based on a failure to state a claim. *See United Steelworkers v. Or. Steel Mills, Inc.,* 322 F.3d 1222, 1228 (10th Cir. 2003). That is clearly not the posture of the appeal with respect to the contract claim. Instead, the Districts directly challenge the district court's order on reconsideration, in which the court refused to hear argument on the Districts' contract theory of recovery, not because they failed to state a claim but because they failed to do so in a timely fashion.

Contract Claim

We explained the genesis of the 1937 contracts in *EBID II*:

> In 1937, Congress enacted a law authorizing the Secretary of the Interior to contract with the water districts for the purpose of terminating their leases of power privilege. *See* Interior Department Appropriations Act of 1938, ch. 570, Pub.L. No. 75-249, 50 Stat. 564, 593. Leases of power privilege had previously been granted by the Secretary to the water districts pursuant to an earlier Act of Congress. In these leases, the federal government gave the water districts the right to build power facilities and to use the proceeds from those facilities to repay their construction obligations. However, the water districts never executed their rights to build power facilities on water project lands. The 1937 Act was designed to return to the federal government the right to build power facilities while giving the water districts a distinct benefit: relief from the obligation to repay their outstanding construction costs. Both El Paso and the Elephant Butte Irrigation District entered into contracts with the Secretary of the Interior in accordance with the 1937 Act.

EBID II, 269 F.3d at 1162. On appeal, the Districts claim "[t]he terms of the 1937 Contracts created duties that prevent the Secretary [of DOI] from arbitrarily destroying the Districts' right to credits under Subsection I. The Subsection I benefits were an

essential element of the consideration running to the Districts[,] and the Contracts cannot now be interpreted as if the Subsection I rights do not exist. . . ." Aplt. Br. at 25. To support their contention that their contract claim is not new, the Districts cite to a number of pleadings in which the 1937 Contracts were referenced. However, a close review of each of those pleadings, other than the complaint, clearly shows that the arguments relating to the contracts were statutory and not contractual in nature. As for the complaint, the District failed to pursue any contract claim they may have asserted there.

In the pretrial order, for example, the Districts contended that the recreation lease violated the government's fiduciary duty to them, exceeded DOI's statutory mandate, failed to confer any benefit to the project's beneficiaries, and that they had standing to challenge the lease because they had vested rights to revenues. While they made some general assertions of breach of contract, they made no claim that the lease constituted a breach of the covenants of good faith and fair dealing in the 1937 contracts. The Districts were obliged to spell out any breach of contract claim "with specificity and clarity" in the pretrial order. *See Wilson v. Muckala,* 303 F.3d 1207, 1216 (10th Cir. 2002). This is so because "'the pretrial order is treated as superceding the pleadings and establishing the issues to be considered at trial.'" *Id.* at 1215 (quoting 6A FEDERAL PRACTICE & PROCEDURE § 1522); FED. R. CIV. P. 16(e) (the pretrial order

"controls the course of the action unless the court modifies it").

The Districts passed up additional opportunities to expressly raise a contract theory during the extensive summary judgment briefing. While the Districts are correct that they *mentioned* the 1937 contracts in the first round of summary judgment briefing on Count II in 1994, their only theory of recovery was that the DOI did not have statutory authority to give revenues to the State under the recreation lease. Aplt. App., vol. IV at 996-97. Their opening brief argued, "[i]n Count II, Plaintiffs contend that the Federal Defendants acted beyond the statutory authority granted to them" and that the 1962 Act authorizing construction and leasing to the State of recreational facilities at Elephant Butte and Caballo Reservoirs "did not authorize the Federal Defendants to assign these revenues to the State Defendants." *Id.* at 1000-01. This was so, they contended, because "[p]laintiffs are entitled to Subsection I revenue credits from all Project lands including those surrounding the reservoirs." *Id.* at 1003. For relief, they sought *only* a declaration that the recreation lease is *ultra vires* or, in the alternative, that the recreation lease be reformed to give them Section 4-I revenues. *Id.* at 1001. In their brief in response to DOI's motion for summary judgment on Count II, the Districts reiterated that "[t]he issue is whether there was actual statutory authority for the provisions in the lease agreement concerning Project revenues." *Id.* 1077-78.

Even if the various references to the 1937 contracts in the Districts' 1994 summary judgment briefs could be read as implying a breach of contract theory of some kind, those references were not sufficient to put DOI or the court on notice that the Districts intended to assert such a theory. In its discussion of Count II in its 1997 opinion, the district court did not mention the 1937 contracts. When the Districts filed a motion for clarification of that opinion in 1999, they did not present a breach of contract theory. Nor did the district court mention the 1937 contracts in its order granting that motion in part. Aplt. App. 1156-58; *cf. Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991) ("The district court's opinion does not discuss the issue at all, from which we must conclude that it did not regard the issue as properly before it.").

In the second round of summary judgment briefing on Count II, the Districts again mentioned the 1937 contracts, but they did not present a breach of contract theory. To the contrary, they affirmatively asserted the contracts were not relevant because Section 4-I is a statutory right that did not have to be granted in a contract. Aplt. App., vol. V at 1390 ("Whether Subsection I Benefits Are Based On Statute Or Contract Is Irrelevant"); *id.* at 1391 ("Subsection I rights are statutory"); *id.* at 1404 ("The Subsection I rights of the Irrigation Districts are secured by statute and there is no requirement to 'secure' or 'bargain' for them by contract."); *see also id.* at 1379 n.2 (asserting that the district court had held

their right to Section 4-I revenues was "statutorily based," not contractual). Not surprisingly, then, the district court did not mention the 1937 contracts in its 2003 opinion on Count II. Aplt. App., vol. VI at 1531-44. In their motion for reconsideration of that opinion, filed thirteen years after the complaint, the Districts argued for the first time that the court "ignores the covenant of good faith and fair dealing" and "emasculates a great part of the consideration bargained for by the Districts in the [1937] Contracts." *Id.* at 1590.

A district court does not abuse its discretion in refusing to consider a theory raised for the first time at an advanced stage of litigation. In *Geddes,* 496 F.3d at 928, for example, the defendant raised an issue for the first time at oral argument on the plaintiff's summary judgment motion. The defendant had mentioned related points earlier, but "failed to argue the . . . issue explicitly." *Id.* We held the district court did not abuse its discretion in refusing to consider the new issue "at the late juncture when it was raised." *Id.* Like the defendant in *Geddes,* the Districts here did not explicitly raise their contract theory in a timely manner, but instead belatedly sought to "bootstrap" their new argument onto a broader theory of statutory interpretation. *See id.* Indeed, the Districts were considerably tardier here than the defendant in *Geddes* because they failed to explicitly raise their contract theory until their motion for reconsideration of the district court's *second* summary judgment ruling on Count II. The district court did not abuse its

discretion in holding that the contract theory of recovery was waived.[2]

Statutory Interpretation

In their continued effort to gain profits from the recreation leases, the Districts contend the applicable statutes impose a business standard on the Secretary in managing project lands, even if they don't impose a fiduciary duty. They assert the district court erred in holding to the contrary. Given our opinion in *EBID II*, we disagree.

A brief history of Count VI and the rulings thereon are necessary to explain why the district court appropriately extended the analysis of Count VI to Count II. Count VI challenged the validity of the lease agreement between DOI agencies for management of grazing lands within the Districts. The Districts asserted the recreation lease was not in the best interest of the project beneficiaries because it resulted in no consideration to them. Prior to the DOI lease agreement, the Districts had received credits for the lease of grazing lands. The Districts based Count VI on the Secretary's alleged duty to manage the grazing lands "on a sound operative and business

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[2] Because we agree with the district court that the Districts waived any contract claim, we need not address the DOI's contention that the United States did not waive its sovereign immunity with respect to the contract claims, or its alternative contention that any contract claim would be barred by the relevant statute of limitations.

basis" as set out in the Omnibus Adjustment Act of 1926, 43 U.S.C. §423f (OAA). They contended that this statutory language, combined with that of Section 4-I, imposed a fiduciary duty upon the government to generate profits in managing the grazing leases. We held in *EBID II* that neither the plain language of the acts nor their legislative history indicated Congressional intent to impose a fiduciary duty on the DOI. In doing so, we said:

> The plain language of Section 4-I and the OAA simply does not lend itself to the interpretation which the water districts argue it should be given. *First, we do not agree that the DOI is required to administer and manage the water project lands in such a way that profits are generated.* Although Section 4-I does refer to profits from grazing leases, that provision only directs how such profits, if any, are to be distributed and does not require that profits in fact be made. 43 U.S.C. § 501. *Second,* we agree with the district court that Section 4-I "does not create a fiduciary duty to the Districts." Likewise, the OAA does not create such a duty. *Although one provision of the OAA states that the purpose of the act is "the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis,"* 43 U.S.C. § 423f (1994), *and directs the DOI to administer those sections of the act "to those ends," id., this language, without more, does not create a fiduciary duty in the DOI towards the water districts.*

> We also observe that the legislative history of the two acts relied upon by the water districts further undercuts their argument. As we discuss above, these statutes were enacted by Congress in an attempt to rescue and rehabilitate the federal irrigation projects, which had fallen on hard times at several different junctures during the first half of the Twentieth Century. Congress's concern, stated clearly in the fact finders' report and various statutes, was that the reclamation fund was becoming insolvent because the water districts were not repaying their obligations to the federal government. We do not believe that Congress was attempting to put the water districts under the protective care of the DOI, but rather was simply trying to find a way to help the water districts repay the money that they owed the federal government so that the reclamation fund would have cash in its coffers. *Id.* To that extent, the water districts are correct in terming Section 4-I an "entitlement" given to the water districts by the federal government. But the creation of an entitlement is different from the creation of a fiduciary duty on the part of the DOI towards the water districts. . . . We can discern no congressional intent to create such a duty in the statutes or the history surrounding their enactment.

EBID II, 269 F.3d at 1166-67 (internal citations omitted) (emphasis added).

Contrary to the Districts' current argument, the factual differences in the Count II and VI do not

affect the outcome. Under both counts, the same two statutes apply to determine whether the Secretary has a fiduciary duty, or some lesser duty stemming from a business acumen standard, to manage the project lands so as to generate a profit. This is a question of pure statutory interpretation. In an attempt to undercut this conclusion, the Districts argue that the grazing lease scheme in Count VI had no potential for profits whereas the recreation leases had great potential. The greater potential for profits could not have been envisioned when the statutes were enacted because no recreation leases were in play at that time. The DOI either has a duty under the acts to generate profits or it does not, regardless of the type of lease, and we held in *EBID II* that it does not. The district court correctly extended that reasoning to Count II.

Material Disputes of Fact

The Districts argue that material disputes of fact precluded the district court from deciding Count II on summary judgment. Again, we disagree. Many of the facts the Districts suggest are material go to the contract claim, which we have already determined cannot be pursued at this late stage of the litigation. More importantly, the Districts failed to file a statement of disputed issues of material fact or an affidavit demonstrating the need for further discovery in the district court.

For example, the Districts claim that the accuracy of the accounting DOI prepared at the direction of the district court was a disputed issue of fact that precluded summary judgment and necessitated further discovery. The district court rejected the Districts' objections to the accounting. In particular, the court was not persuaded by the Districts' "concerns [about] possible factual disputes," pointing out that they failed to identify the parts of the accounting that they could not understand, failed to seek an explanation of those parts from DOI, declined "informal opportunities to discover the facts that underlay the accountings," failed to request additional time to review the accounting, failed to attach an affidavit documenting the need for additional discovery, App., vol. VI at 1748, and thus "failed to show a legitimate need for discovery," *id.* at 1749.

Under FED. R. CIV. P. 56, a party opposing a motion for summary judgment "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." FED. R. CIV. P. 56(e)(2). The rule specifically provides how an opposing party may comply with the rule if it needs discovery. "If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable . . . discovery to be undertaken; or (3) issue any other just

order." FED. R. CIV. P. 56(f). As we have made clear, "the nonmovant must carry its burden in the district court in a timely fashion pursuant to Rule 56(e) . . . or explain why it cannot pursuant to Rule 56(f). Otherwise, the nonmovant acts, or fails to act, at its peril." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) (internal citation omitted); *see also Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006) ("A nonmoving party wishing to invoke the protections of Rule 56(f) must attempt to do so by submitting an affidavit in direct response to a motion for summary judgment, not following the district court's disposition of that motion."). Given the Districts' failure to comply with Rule 56, the district court's determination in favor of DOI was entirely proper.

Law of the Case

Finally, the Districts contend the district court violated the law of the case doctrine by deciding Count II on summary judgment after the previous judge had decided it was necessary to conduct discovery and hold a trial. Until the district court entered its final judgment on Count II, however, it was free to revisit its earlier rulings. FED. R. CIV. P. 54(b) expressly allows for revision of an interlocutory order before entry of final judgment.

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action

> as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Id. Thus, "every order short of a final decree is subject to reopening at the discretion of the district judge." *Price,* 420 F.3d at 1167 n.9 (internal quotations and citation omitted).

The district court did not enter a final appealable judgment on Count II until July 2006. Neither the first opinion on Count II in 1997 nor the 1999 judgment on Counts I, V and VI entered under Rule 54(b) were final as to Count II. *See* Aplt. App., vol. IV at 1136, 1159. The district court therefore retained discretion to revisit the 1997 opinion regarding Count II.

We **AFFIRM**.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO; EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 OF TEXAS, Plaintiff-Appellees and Cross-Appellants, v. UNITED STATES DEPARTMENT OF INTERIOR; GALE A. NORTON,* Secretary of the Interior; JOHN W. KEYS, III, Commissioner of Reclamation; RICK L. GOLD, Regional Director of Reclamation, Defendants-Appellants and Cross-Appellees.	Nos. 99-2291, 99-2295

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* Pursuant to Fed. R. App. P. 43(c)(2), Gale A. Norton, John W. Keys, III, and Rick L. Gold are substituted as appellants in this action.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-90-95-HB)

(Filed Oct. 25, 2001)

Kathryn E. Kovacs, Attorney, United States Department of Justice, Washington, D.C. (John W. Zavitz, Assistant U.S. Attorney, Albuquerque, New Mexico, Chris Rich, Attorney, U.S. Department of the Interior, Salt Lake City, Utah, Lois Schiffer, Assistant Attorney General, Peter Coppelman, Acting Assistant Attorney General, John A. Bryson and R. Lee Leininger, Attorneys, United States Department of Justice, Washington, D.C., with her on the briefs), for Defendants-Appellants and Cross-Appellees.

Herman E. Ortiz and Lee Peters, of Hubert & Hernandez, P.A., Las Cruces, New Mexico (James M. Speer, Jr., El Paso, Texas, with them on the briefs), for Plaintiffs-Appellees and Cross-Appellants.

Before **SEYMOUR**, Circuit Judge, **PORFILIO**, Senior Circuit Judge, and **JENKINS**, Senior District Judge.**

** The Honorable Bruce S. Jenkins, United States Senior District Judge for the District of Utah, sitting by designation.

SEYMOUR, Circuit Judge.

The United States Department of the Interior and various federal officials (DOI), appeal the district court's grant of summary judgment to plaintiffs Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas (the water districts) on Count I of the water districts' complaint. The water districts cross-appeal the grant of summary judgment to DOI on Count VI of the complaint. For the reasons explained below, we affirm.

I.

The operative facts of this case date back to the early twentieth century. The two projects involved in this litigation are the El Paso and Elephant Butte Irrigation Districts, both of which are part of the Rio Grande Valley irrigation project. That project was part of a national drive to irrigate arid western lands during the late nineteenth and early twentieth centuries. Much of the early irrigation work was originally undertaken by private entities. In 1902, the federal government became involved when Congress passed the Reclamation Act, which created a general reclamation fund for the federal financing of these large-scale irrigation projects under the auspices of the DOI. *See* 43 U.S.C. §§ 371-600 (1994). At its inception, the reclamation fund was to be made up entirely of money received from the sale of public lands. The fund would then make loans to local water districts to

finance the construction costs of irrigation projects. After construction was complete, the water districts were to reimburse the fund for the construction loans over a period of ten years.

The agricultural depression of the 1920s made Congress's original plan for the operation of the reclamation fund unworkable. Many of the water districts were unable to make payments to the fund on their construction loans because of the depression, causing widespread default. Moreover, the sale of public lands had slowed so much by the 1920s that it became impractical to make such sales the sole basis for the fund. Congress first attempted to remedy the situation by extending the water districts' term of repayment from ten to forty years. However, this worsened the problem by reducing even further the amount of cash going into the fund, and the fund became completely insolvent because it could not revolve quickly enough.

Unsure what to do about the situation, Congress commissioned a fact finders' report to assess ways to address the circumstances facing the government, the water districts, and the reclamation fund. The report recommended that once the majority of construction costs had been repaid by the water districts, the districts should be required to take over from the government the operation and maintenance of the projects. In exchange, the water districts would be able to retain certain of the profits garnered by the irrigation projects rather than having to return all profits to the reclamation fund. The goal was to make

both the water districts and the reclamation fund solvent.

Based upon the recommendations contained in that report, Congress amended the Reclamation Act in 1924 by adding, inter alia, a new provision, known as Section 4-I, which stated as follows:

> Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

43 U.S.C. § 501 (1994) (Section 4-I). Section 4-I provided for what is called "front end" crediting, under which the water districts would first apply profits to their annual repayment obligations, then to their annual operation and maintenance charges, and

finally as the water users decided. This method had the effect of reducing the districts' next payment.[1]

As the economic depression worsened, Congress provided still more assistance to water districts in 1926 through a statute authorizing the Secretary of the Interior "to grant the relief provided for in [Section 4-I] to any of the projects mentioned in this Act, without requiring such project to take over the care, operation, and maintenance of the project works." Omnibus Adjustment Act of 1926, ch. 383, Pub. L. No. 69-284, 44 Stat. 636, 649 § 45. The water districts would thus be absolved of their responsibilities under Section 4-I and would be able to derive some profits from the project lands, which they could use to pay the reclamation fund. The Act also removed the repayment obligations of the water districts with respect to any land in their project that had proved to be non-irrigable.

In 1937, Congress enacted a law authorizing the Secretary of the Interior to contract with the water districts for the purpose of terminating their leases of power privilege. *See* Interior Department Appropriations Act of 1938, ch. 570, Pub. L. No. 75-249, 50 Stat. 564, 593. Leases of power privilege had previously been granted by the Secretary to the water districts

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[1] "Front end" crediting is different from "tail end" crediting, which forces a debtor to apply profits first to the principal owed and second to the annual repayment obligation. *See* Aplt. Br. at 6. "Tail end" crediting reduces the principal but not the next payment. *Id.*

pursuant to an earlier Act of Congress. In these leases, the federal government gave the water districts the right to build power facilities and to use the proceeds from those facilities to repay their construction obligations. However, the water districts never executed their rights to build power facilities on water project lands. The 1937 Act was designed to return to the federal government the right to build power facilities while giving the water districts a distinct benefit: relief from the obligation to repay their outstanding construction costs. Both El Paso and the Elephant Butte Irrigation District entered into contracts with the Secretary of the Interior in accordance with the 1937 Act.

Despite these various attempts by Congress to save the reclamation fund, it was still in dire financial straits in 1939. Consequently, Congress enacted 43 U.S.C. § 392a, known as the Hayden-O'Mahoney Amendment to the Interior Department Appropriations Act of 1939 (the Amendment or Hayden-O'Mahoney). The Amendment provided:

> All moneys received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation, and financed in whole or in part with moneys heretofore or hereafter appropriated or allocated therefor by the Federal Government, shall be covered into the reclamation fund, except in cases where provision has been made by law or contract for the use of such

> revenues for the benefit of users of water from such project: *Provided,* That after the net revenues derived from the sale of power developed in connection with any of said projects shall have repaid those construction costs of such project allocated to power to be repaid by power revenues therefrom and shall no longer be required to meet the contractual obligations of the United States, then said net revenues derived from the sale of power developed in connection with such project shall, after the close of each fiscal year, be transferred to and covered into the General Treasury as "miscellaneous receipts. . . ."

43 U.S.C. § 392a (1994). The Amendment was designed to increase the reclamation fund by depositing into it any money made by federal power facilities. To that end, the Amendment repealed the earlier right to profits from any power facilities granted to the water districts by Section 4-I. However, the Amendment contained a savings clause protecting the receipt by water districts of revenues provided for under preexisting contracts or other laws.

In 1979 and 1980, the water districts took over the operation and maintenance of their irrigation facilities. In January 1990, the complaint in this action was filed by the water districts against the federal government. In Count I, the districts contended they were owed revenues granted to them by Congress in Section 4-I. They asserted that these revenues were owed them notwithstanding

the subsequent enactment of Hayden-O'Mahoney, which they alleged did not repeal Section 4-I. The government countered that Hayden-O'Mahoney did in fact repeal Section 4-I in its entirety. The districts also asserted three other counts: Count II, challenging the Bureau of Reclamation's lease of lands; Count III, challenging the Bureau's transfer of stored water; and Count IV, challenging the imposition of operation and maintenance charges by the Bureau.

In a September 1992 order, the district court granted summary judgment to the water districts on Count I. In October 1993, the water districts filed an amended complaint which added two additional counts. Count V sought the immediate transfer of title to project irrigation works to the water districts. Count VI sought termination of the current memorandum of understanding between the Bureau of Land Management and the Bureau of Reclamation concerning the management of project lands on which grazing leases had been granted.

In October 1996, the water districts and the DOI entered into a stipulation in which they agreed upon the amount of the Section 4-I net profits. The districts dismissed Count IV with prejudice and the Bureau of Reclamation forgave the districts' operation and maintenance deficit charges for three years. In a separate stipulation, the parties dismissed Count III.

Following cross-motions for summary judgment on Count II and the DOI's motion for summary judgment on Counts V and VI, the district court issued an

order in April 1997 that addressed these three remaining claims. The court denied summary judgment on Count II, finding that a material factual issue was in dispute. The court granted the DOI's motion for summary judgment on Counts V and VI. A motion for clarification was filed by the water districts on April 23, 1997, and the court issued a clarification on June 24, 1999. A Rule 54(b) order was entered in the case on July 20, 1999, to permit this appeal.

On appeal, the DOI challenges the district court's decision with regard to Count I. The water districts cross-appeal the district court's resolution of Count VI.

II.

We review a grant of summary judgment de novo, applying the same legal standard used by the district court. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms*, 165 F.3d at 1326.

Count I

The district court ruled as a matter of law that Hayden-O'Mahoney did not repeal Section 4-I in its entirety. The government challenges that determination, contending the Amendment terminated all of the water districts' rights to revenues arising under Section 4-I except for those revenues covered by the savings clause of the Amendment, i.e., those revenues to which water districts had a preexisting legal or contractual right.[2]

As the district court correctly noted, "'the repeal of a statute by implication is not favored.'" App. vol. II, at 301 (quoting *Yellowfish v. City of Stillwater,* 691 F.2d 926, 928 (10th Cir. 1982)). Any repeal by implication requires that "the intention of the legislature to repeal must be clear and manifest." *Posadas v. National City Bank of New York,* 296 U.S. 497, 503 (1936). Repeal by implication may be found in only two situations: "(1) Where provisions in the two acts

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[2] The government also argued below that the court was required to defer to the Bureau of Reclamation's interpretation of the reclamation laws. The court declined to do so, observing that "the agency has not interpreted the statutes in relation to plaintiffs' entitlement to [Section 4-1] revenues in any reasonably consistent manner prior to the instigation of the lawsuit." App. vol. II, at 308. Although the government again asserts this argument pro forma on appeal, it offers no argument or authority specifically controverting the district court's conclusion or the evidence upon which that conclusion was based. Accordingly, we affirm the district court's determination that deference is not appropriate here.

are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna,* 542 F.2d 1375, 1376 (10th Cir. 1976) (quoting *Posadas,* 296 U.S. at 503).

The district court examined the two statutes at issue, found two obvious conflicts between them, and held that "Hayden-O'Mahoney is a repeal or modification to the extent of those conflicts." App. vol. II, at 302. The first of these modifications, under the district court's analysis, provided that once the water districts repaid their construction cost obligations for power facilities, "net revenues thereafter derived from the sale of power were no longer to remain in the reclamation fund to be credited to the project under [Section 4-I], but would be deposited into the General Treasury." *Id.* Second, "Hayden-O'Mahoney also removes the possibility, implied in the final sentence of [Section 4-I], that once the water users had paid off all their obligations . . . net profits could be distributed to the water users directly." *Id.* The court concluded that "nothing in Hayden-O'Mahoney 'clearly and manifestly' changes other [Section 4-I] provisions" regarding the way in which other net revenues were to be credited to the water districts. *Id.* at 302-03.

After analyzing the plain language of the statute, the district court extensively assessed the legislative history behind Hayden-O'Mahoney. The court cited several letters from the Secretary of the Interior explaining the proposed legislation, which were published in the Congressional Record. *See id.* at 303-06. These letters demonstrate that the purpose behind Hayden-O'Mahoney was the bolstering of the reclamation fund, "perhaps at the expense of the General Treasury, but not at the expense of the water users, except with regard to power revenues." *Id.* at 305 (footnote omitted).

We agree with the district court's analysis of this issue. The plain language of the statute does not purport to repeal Section 4-I. The legislative history demonstrates that the congressional intent behind Hayden-O'Mahoney was merely to deposit power revenues into the fund and then the general treasury, rather than to recapture all the profits to which the water districts were entitled under Section 4-I. Hayden-O'Mahoney does not mention the two other sources of revenue in Section 4-I: the leasing of project grazing and farm land, and the sale or use of town sites. Furthermore, even if we assume the wording of Hayden-O'Mahoney is confusing, that fact would cut against finding repeal by implication, which must be *clear and manifest. Posadas,* 296 U.S. at 503.

We further agree with the district court's analysis of the scope of the modifications made to Section 4-I by Hayden-O'Mahoney. First, the Amendment

directed that funds derived from the sale of power ultimately become part of the general treasury and not the reclamation fund. Second, the Amendment directly repealed Section 4-I with regard to the distribution of profits to the water districts.[3]

Finally, the government takes issue with the district court's ruling that if the water districts are entitled to credits under Section 4-I, they are entitled to credits from the entire Rio Grande Project. The government argues that the 1937 contracts between it and the water districts divided the Rio Grande Project into two "divisions": the storage division and the irrigation and drainage division, and that the water districts are therefore entitled at most to credits from the irrigation portion of the project. The district court held that the 1937 contracts did not divide the project for any purpose but that of operation and maintenance. In fact, the 1937 contracts use only the word "system," not the word "division." We agree "[t]here is no indication that the drafters of [Section 4-I] contemplated a project would be divided

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[3] We note that our holding today is in direct conflict with the holding of the Ninth Circuit in *Fort Belknap Irrigation Dist. v. Bureau of Reclamation*, No. 99-35615, 2000 WL 1868213 (9th Cir. Dec. 20, 2000), which was decided while this appeal was pending. However, the Ninth Circuit's opinion was unpublished and provided little analysis in support of its holding. As an unpublished opinion, it has no precedential value under the rules of that circuit, except as it relates to the doctrines of the law of the case, collateral estoppel, and res judicata. 9th Cir. R. 36-3(a).

for purposes of operation and maintenance as the Rio Grande Project was divided in the 1937 contracts." App. vol. II, at 314. We accordingly affirm the ruling of the district court as to Count I.[4]

Count VI

In their amended complaint the water districts added Count VI, which challenged the validity of the lease agreement between the Bureau of Reclamation (BOR) and the Bureau of Land Management (BLM) for management of grazing lands within the water districts.[5] App. vol. II, at 320-21. The water districts challenged the lease as "not in the best interests of the Project beneficiaries" since the lease arrangement provided "no consideration" to them. *Id.* at 321. The districts noted that "prior to the leasing agreement . . . the Plaintiffs received credits for the leasing of grazing lands. . . . The Plaintiffs have now been notified that they will no longer receive such credits

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[4] The district court, after ruling that Hayden-O'Mahoney was not a complete repeal by implication of Section 4-I, went on to discuss the effect of the 1937 contracts between the water districts and the federal government in light of the savings clause found in Hayden-O'Mahoney. App. vol. II, at 306-07. Because we affirm the district court's ruling on the repeal-by-implication issue, we need not decide whether the 1937 contracts fit within the savings clause, since, as the district court noted, that issue is "immaterial" if there was no repeal of Section 4-I. *Id.*

[5] The BOR and the BLM are both agencies of the DOI.

as a result of the management practices" of the DOI. *Id.*

In support of their position, the water districts asserted that the DOI had a fiduciary duty to them and that this duty required the DOI to manage the grazing lands "on a sound, operative and business basis." *Id.* The water districts contended that the current lease of grazing lands between the BOR and the BLM violated this fiduciary duty since it did not maximize profits to be credited to the water districts. *Id.* As a remedy, the water districts sought to have the current memorandum of understanding between the BOR and the BLM terminated. *Id.* at 322.

The DOI responded that "Congress has plenary authority over the management of the federal lands under its constitutional authority" and that Congress had granted authority to both the BLM and the BOR "to enter into land management agreements." *Id.* at 329. The district court agreed with the government, holding that no fiduciary duty was owed the water districts by the federal government, that the DOI had no obligation to generate profits for the water districts, and that the authority of the Secretary of the Interior to administer public lands was broad and unfettered. *Id.* at 397-98.

On appeal, the water districts argue that the district court erred in granting summary judgment as to Count VI. They urge us to find that Section 4-I and the Omnibus Adjustment Act of 1926 (OAA) impose upon the Secretary of the Interior a special

responsibility towards the water districts, a responsibility which includes making profits for the water districts through grazing leases. We are not persuaded.

Congress plainly has plenary power over the management of federal lands under the United States Constitution, art. IV, § 3, cl. 2. We agree with the DOI that Congress "has delegated to the BLM and the BOR the authority to enter into land management agreements" through the enactment of various statutes to that end. Aplt. Reply Br. at 26 (citing, inter alia, Federal Land Policy and Management Act, 43 U.S.C. § 1737 (1994); Federal Water Project Recreation Act, 16 U.S.C. §§ 460*l*-18 (1994); Reclamation Act of 1902, 43 U.S.C. § 373) (1994). More specifically, as the district court correctly stated, "the Reclamation Act of 1902 grants the Secretary of Interior broad authority 'to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.'" App. vol. II, at 397-98 (*quoting* 43 U.S.C. § 373).

The plain language of Section 4-I and the OAA simply does not lend itself to the interpretation which the water districts argue it should be given. First, we do not agree that the DOI is required to administer and manage the water project lands in such a way that profits are generated. Although Section 4-I does refer to profits from grazing leases, that provision only directs how such profits, if any, are to be distributed and does not require that profits in fact be made.

43 U.S.C. § 501. Second, we agree with the district court that Section 4-I "does not create a fiduciary duty to the Districts." App. vol. II, at 397. Likewise, the OAA does not create such a duty. Although one provision of the OAA states that the purpose of the act is "the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis," 43 U.S.C. § 423f (1994), and directs the DOI to administer those sections of the act "to those ends," *id.*, this language, without more, does not create a fiduciary duty in the DOI towards the water districts. *See, e.g., Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 633-34 (10th Cir. 1998) (discussing creation of trust by Congress through manifestation of intent to create a fiduciary responsibility).

We also observe that the legislative history of the two acts relied upon by the water districts further undercuts their argument. As we discuss above, these statutes were enacted by Congress in an attempt to rescue and rehabilitate the federal irrigation projects, which had fallen on hard times at several different junctures during the first half of the Twentieth Century. Congress's concern, stated clearly in the fact finders' report and various statutes, was that the reclamation fund was becoming insolvent because the water districts were not repaying their obligations to the federal government. *See* S. DOC. NO. 68-92, at 106-07 (1924). We do not believe that Congress was attempting to put the water districts under the protective care of the DOI, but rather was simply

trying to find a way to help the water districts repay the money that they owed the federal government so that the reclamation fund would have cash in its coffers. *Id.* To that extent, the water districts are correct in terming Section 4-I an "entitlement" given to the water districts by the federal government. Aple. Br. at 35. But the creation of an entitlement is different from the creation of a fiduciary duty on the part of the DOI towards the water districts. *See Branson Sch. Dist.*, 161 F.3d at 634 (distinguishing between words creating "'honorary' obligation" and words evincing intent to create fiduciary obligation). We can discern no congressional intent to create such a duty in the statutes or the history surrounding their enactment.

We **AFFIRM** the judgment of the district court on Counts I and VI.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE
IRRIGATION DISTRICT
OF NEW MEXICO, EL
PASO COUNTY WATER
IMPROVEMENT DISTRICT
NO. 1, OF TEXAS,

Plaintiffs,

CIV. 90-0095-HB

v.

UNITED STATES
DEPARTMENT OF
THE INTERIOR; et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Entered Sep. 3, 1992)

This matter is before the Court on cross-motions for partial summary judgment submitted by the plaintiffs and the federal defendants. After hearing oral argument by the parties on April 9, 1992, and reading the memoranda and exhibits submitted by the parties, and being fully familiar with the applicable law, the Court finds that the plaintiffs' motion is well-taken and should be granted and the federal defendants' motion is not well-taken and should be denied.

In these cross-motions, the parties ask the Court to decide whether plaintiffs are entitled to credit for

certain revenues collected by the Bureau of Reclamation in accordance with 43 U.S.C. § 501 (1924), also known as Subsection I of the Factfinder's Act of 1924. Subsection I provides:

> Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

In 1979, Elephant Butte Irrigation District (EBID) took over the care, operation, and maintenance of its portion of the Rio Grande Project, and in 1980 El Paso County Water Improvement District No. 1 (El Paso) took over the care, operation and maintenance of its portion of the Rio Grande Project. Under the terms of Subsection I, once EBID and El Paso took of the care, operation, and maintenance of their respective divisions of the project, they were entitled

to receive credit for the total accumulated net profits "derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites."[1]

Under the terms of Subsection I, these net profits should have been applied at the time of takeover as a credit to the construction charge of the project.[2] However, prior to takeover, in 1971 and 1975 respectively, EBID and El Paso made their final payments on their construction obligations. Accordingly, after takeover, the statute mandates that net profits be credited annually "second, on account of project operation and maintenance charge, and third, as the water users may direct."

The federal defendants claim that 43 U.S.C. § 392(a) (1938), known as the Hayden-O'Mahoney amendment,[3] terminated plaintiffs' entitlement to Subsection I revenues. The Hayden-O'Mahoney Amendment provides:

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[1] How these credits should be divided between the two sections of the Project is beyond the scope of this opinion.

[2] The plaintiffs argue they were entitled to Subsection I credit before takeover as a result of the Omnibus Adjustment Act of 1926. Although that Act may have given the Secretary discretion to remove the pre-condition that the water users take over the care, operation and maintenance of the projects, the plaintiffs have submitted no documentation showing that any Secretary ever exercised his discretion in that regard.

[3] This was an amendment, proposed by Mr. Hayden, Senator from Arizona, and Mr. O'Mahoney, Senator from Wyoming, to the 1939 Interior Department appropriations bill.

> All moneys received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation, and financed in whole or in part with moneys heretofore or hereafter appropriated or allocated therefor by the Federal Government, shall be covered into the reclamation fund, except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such project: *Provided,* That after the net revenues derived from the sale of power developed in connection with any of said projects shall have repaid those construction costs of such project allocated to power to be repaid by power revenues therefrom and shall no longer be required to meet the contractual obligations of the United States, then said net revenues derived from the sale of power developed in connection with such project shall, after the close of each fiscal year, be transferred to and covered into the General Treasury as "miscellaneous receipts" . . .

The federal defendants maintain that this statute, by implication, repealed or modified Subsection I except that the terms of Subsection I would continue to be applied to projects having a contract specifically referring to Subsection I or where Congress had enacted special legislation for the benefit of a particular project. They also argue that the Court should adopt this interpretation of Hayden-O'Mahoney

because it is a long-standing one by the Bureau of Reclamation, the agency charged with the administration of the reclamation laws.

Plaintiffs counter with three arguments. First, they cite to the maxim that courts do not favor repeal by implication. Second, they contend there is no long-standing interpretation by the Bureau supporting the federal defendants' position. On the contrary, they submit documentation indicating employees of the Bureau of Reclamation have consistently indicated to them they are entitled to Subsection I revenues. Third, they believe they have contracts with the Bureau preserving their rights to Subsection I revenues, even if Hayden-O'Mahoney would have otherwise stripped them of those rights. The Court agrees in part with plaintiffs' arguments and ultimately concludes the districts are entitled to some of the benefits of Subsection I.

In reiterating that "the repeal of a statute by implication is not favored," the Tenth Circuit synthesized a framework for the examination of a claim that Congress has repealed an earlier statute. *Yellowfish v. City of Stillwater,* 691 F.2d 926, 928 (10th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983).

> There are two well accepted categories of repeal by implication: '(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended

> as a substitute, it will operate similarly as a repeal of the earlier act.' In either situation, legislative history and congressional intent are important factors, but the intent of the legislature must be "clear and manifest" to uphold an implied repeal.

Id. (citations omitted.)

The Court has carefully read both statutes, compared them, and has read the legislative history surrounding the enactment of the Hayden-O'Mahoney amendment. It is clear from a reading of the two statutes there are two obvious conflicts between the statutes and that Hayden-O'Mahoney is a repeal or modification to the extent of those conflicts. Hayden-O'Mahoney modified Subsection I to the extent that once water users of a particular project have repaid construction costs advanced by the federal government and allocated to power, net revenues thereafter derived from the sale of power were no longer to remain in the reclamation fund to be credited to the project under Subsection I, but would be deposited into the General Treasury. Hayden-O'Mahoney also removes the possibility, implied in the final sentence of Subsection I, that once the water users had paid off all their obligations to the federal government, net profits could be distributed to the water users directly. However, nothing in Hayden-O'Mahoney "clearly and manifestly" changes other Subsection I provisions that certain other net revenues should be credited to the water users' obligations after they

take over the care, operation, and maintenance of their project or division.

The legislative history supports this interpretation. The overriding purpose of the Hayden-O'Mahoney amendment was to increase the size of the reclamation fund. *See generally* 83 Cong. Rec. 4727-35, 5809-17 (1938). A portion of a letter read into the record states the problem the amendment proposed to rectify:

> Any comment on H.R. 10120 must include a statement that there is serious need for revenues to supplement the reclamation fund.
>
> In the beginning the reclamation fund was set up to receive a portion of the receipts from the sale of public lands.[4] At that time the public lands were moving rapidly under the homestead law and it was apparently believed that their sale would provide a constant source of accretions to the reclamation fund. Since repayments made by project water users also were covered into the reclamation fund, it was believed that as this fund revolved, and was fed by accretions, an adequate construction program could be financed on a continuing basis solely from the reclamation fund. There were two flaws in the original plan. One was that the era of sales of large amounts of public lands was

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[4] *See* 43 U.S.C. § 391 (1902).

> drawing to a close. Accretions to the reclamation fund from that source reached a peak of more that $9,000,000 but have declined steadily for 30 years. Last year they amounted to only a little more than $125,000, and they will not again increase in the future. The other flaw was that the Reclamation Act originally required repayment of the cost of the projects in 10 years, despite the fact that at that time outstanding private irrigation bonds bore maturity dates from 35 to 40 years. It is not illogical to grant so long a term, since irrigation projects are permanent improvements and did not depreciate in value rapidly, if at all.
>
> By 1920 the Congress began to cast about for means of supplementing the reclamation fund. Since than a portion of the receipts from royalties from oil on public lands, from royalties on minerals on the public lands, from power-site licenses, etc.,[5] have been placed by law in the reclamation fund. These have not provided an adequate substitute for the receipts from the sale of public lands.

83 Cong. Rec. 5815 (1938).

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[5] Proceeds from the leasing of lands withdrawn under reclamation law or necessary for the operation of reclamation projects were also covered into the reclamation fund. 43 U.S.C. § 394 (1919).

The Secretary of the Interior states the more specific purposes of the amendment in the following paragraph:

> H.R. 10120 would accomplish two purposes. It would transfer a portion of the receipts from royalties on oil from naval petroleum reserves to the reclamation fund[6] and it would cover into the reclamation fund repayments of project costs by water and power users, with certain exceptions to avoid conflict with existing contracts and special legislation, on all Federal reclamation projects, regardless of the original source of funds expended in the construction.

Id.

Finally, the Secretary's letter describes the function of Section 3 of the amendment, the portion federal defendants claim repeals or modifies Subsection I:

> Section 3 of the bill provides that all the moneys received by the United States in repayment of construction costs in connection with any irrigation project of the Bureau of Reclamation, with the exceptions noted above, shall be covered into the reclamation fund. Involved here are collections to be made in connection with the Federal irrigation

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[6] This section of the amendment is codified at 43 U.S.C. § 391a-1, and it was this section that sparked much of the debate on the amendment. *See generally* 83 Cong. Rec. 4727-35.

> projects begun or continued with allotments by the Public Works Administration, with allotments from the Emergency Relief Acts of 1935 and 1937, and with appropriations direct from the General Treasury.

Id. It is clear from the above excerpts that the Hayden-O'Mahoney amendment was designed to increase the reclamation fund, perhaps at the expense of the General Treasury,[7] but not at the expense of the water users, except with regard to power revenues. Moreover, in this section of his letter, the Secretary mentions only that "moneys received by the United States in repayment of construction costs" are affected by the amendment; he does not mention miscellaneous revenues, such as those covered by Subsection I.

In fact, the only specific reference to Subsection I in the legislative history appears in the Secretary's letter when he describes the savings clause, but again, only in reference to power revenues.

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[7] One commentator stated:

> A principal reason for [the reclamation fund's] large annual income is that repayment of construction costs financed out of the general Treasury revenues – as they have so largely been in recent decades – is required to be made to the reclamation fund rather than to the Treasury. Thus funds borrowed from the Treasury are repaid to the reclamation fund, inaugurating what one observer, not kindly, called "something new in financing." 2 Clyde, et al., *Water and Water Rights* § 111.1, at 131 (Clark, ed. 1967).

> Language in section 3 [43 U.S.C. § 392a] also exempts power revenues now covered by contractual arrangements between the United States and water users on operating projects, so as not to disturb those contracts. These exceptions are adequate and necessary safeguards for . . . the water users. . . . I recommend, however, that, following the word 'fund,' . . . there be inserted the following: 'except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such projects.' There are several projects on which the water users or their organizations have undertaken the repayment of the costs of incidental power developments and have contracts under subsection I of section 4 of the act of December 5, 1924 (43 Stat. 672, 703), respecting the disposition of net power revenues.

83 Cong. Rec. 5815; *see also* 83 Cong. Rec. 4832-33.

In 1937, both EBID and El Paso contracted with the Bureau of Reclamation to relinquish their interests in developing hydroelectric power in the Rio Grande Project in return for a credit against their outstanding construction costs. In the contracts, the districts also specifically gave up their rights to power revenues. The federal defendants claim the districts also intended to give up all their rights under Subsection I. They also argue that, although the Hayden-O'Mahoney amendment repealed or modified Subsection I, had the districts incorporated a specific plan

for the distribution of Subsection I revenues in the 1937 contract, the savings clause would have applied.

First, the districts did not give up any rights under Subsection I except those relating to power. Article 4 specifically and unambiguously provides that "the District desires to receive . . . the benefits of the provisions of other acts of Congress relating to the repayment of charges." Subsection I is an act "relating to the repayment of charges." Article 22 specifically and unambiguously provides that "the consideration hereof running to the District is the benefit conferred under . . . the Acts of December 5, 1924 and May 25, 1926. Subsection I was a section of the "Act of December 5, 1924."

Second, at the time the 1937 contracts were drafted there was no need to incorporate a specific repayment plan for non-power Subsection I revenues. The districts had not yet taken over the care, operation, or maintenance of their divisions, nor could they have foreseen the Hayden-O'Mahoney amendment or the future interpretation of that amendment by the federal defendants.

Finally, since the Hayden-O'Mahoney amendment did not repeal Subsection I, it is immaterial whether or not the savings clause applies. The federal defendants misinterpret the meaning of the savings clause. The Secretary intended the clause to allow those districts "with existing contracts and special legislation," 83 Cong. Rec. 5815 (letter from Secretary of the Interior), to escape the effects of the amendment as it

related to power revenues. These districts were "projects on which the water users or their organizations ha[d] undertaken the repayment of the costs of incidental power developments and ha[d] contracts, under subsection I . . . , respecting the disposition of net power revenues." *Id.* This supports the Court's finding that Hayden-O'Mahoney did not completely repeal Subsection I. If it had, the Secretary would not have qualified his statement as to the particular type of contracts under Subsection I, those applying to power revenues, that would be saved by the clause.

In sum, Subsection I was not repealed by the Hayden-O'Mahoney amendment. The plaintiffs did not agree to give up their Subsection I benefits, other than their right to power revenues, in the 1937 contracts. And the plaintiffs were not required to incorporate specific references to those Subsection I benefits in order to retain them after the enactment of the Hayden-O'Mahoney amendment.

The federal defendants also ask the Court to defer to the Bureau of Reclamation's long-standing interpretation of the reclamation laws, an interpretation defendants maintain supports their position herein. This Court must defer to an agency's reasonable interpretation of a statute where, as here, Congress has not clearly articulated its intent on the issue. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this case, however, the agency has not interpreted the statutes in relation to plaintiffs' entitlement to

Subsection I revenues in any reasonably consistent manner prior to the instigation of this lawsuit.

The defendants submitted several solicitor's opinions in support of their position. However, all the opinions address other projects and other sorts of revenues. Exhibit SSS, a 1944 solicitor's opinion, refers to the Grand Valley Project's receipt of net power revenues. Exhibit UUU, a 1950 solicitor's opinion, refers to the Strawberry Valley Project and the interplay between oil and gas leases, Indian lands, and the Mineral Leasing Act for Acquired Lands, with no mention of the Hayden-O'Mahoney amendment. Exhibit VVV, a 1972 solicitor's opinion, also concerning the Strawberry Valley Project, states that a pre-existing contract preserves the water users' rights to power revenues despite the Hayden-O'Mahoney amendment. The opinion also states that Subsection I revenues may not be distributed directly to the water users but that these revenues may be applied to project purposes under subsection I. Exhibit WWW, a 1978 solicitor's opinion refers to groundwater revenues, not Subsection I revenues.

Exhibit XXX, a 1989 solicitor's opinion regarding disbursement and crediting of mineral leasing revenues from acquired lands, supports defendants' position but does not address the Rio Grande Project. The opinion states the Hayden-O'Mahoney amendment prohibits the Bureau from entering into a contract for the receipt of Subsection I benefits. Utilizing the legislative history, the solicitor writes that the Factfinder's Act was enacted to help the

needy farmers at the time, and the Hayden-O'Mahoney amendment was enacted to help the reclamation fund, and implies Congress must have believed the farmers no longer needed aid. The solicitor refers to Subsection I as "a unique situation not repeated again in reclamation law and specifically disfavored in the Hayden-O'Mahoney Amendment." He concludes that because Subsection I and related statutes do still exist and have not been repealed, the Bureau is obligated to credit revenues to the projects but only to past or future construction charges and not to relieve water users of their statutory obligation to pay operation and maintenance charges.[8]

The Court disagrees that the legislative history surrounding the Hayden-O'Mahoney amendment indicates Congress no longer wanted to help the water users As noted previously in this opinion, if any particular entity or group fared poorly as a result of the amendment, it was the General Treasury or projects which may have desired the full Subsection I benefit from power revenues. Also, there is no justification for the solicitor's conclusion that water users may still retain a credit to their construction charges but not to their operation and maintenance charges. The reclamation fund is to be used "for the construction and maintenance of irrigation works." 43 U.S.C. § 391. Water users are responsible for paying both obligations, although the construction debt may be

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[8] *See* 43 U.S.C. § 492 (1914).

finite and maintenance charges are to be paid yearly and sometimes in advance. *See* 2 Clyde, et al., *Water and Water Rights* § 110.2, at 121 (Clark, ed. 1967) and 43 U.S.C. § 493. The government funds expenses for both construction and maintenance from the reclamation fund; thus any increase in the fund as a result of the Hayden-O'Mahoney amendment would benefit either the construction or maintenance debt. Thus, water users should be able to apply their credits to either construction or operation and maintenance as the statutes require. Finally, the plain language of the statutes, Subsection I and the Hayden-O'Mahoney amendment, does not support a distinction between credit to construction charges and credit to operation and maintenance.

The parties have submitted several documents in which Bureau officials told EBID Subsection I revenues were available to be used as a credit to non-construction charges. In 1953, the Regional Director wrote he had "no reason but to assume that proper and equitable distribution of such profits [from rental revenues] shall be made to the water users." In 1979, the Regional Director wrote that revenue from grazing and leasing permits should have been made available to the district as per Subsection I. However, in 1972 the Acting Associate Solicitor advised the Field Solicitor, who in turn advised the Regional Director, that Subsection I revenues would be available to the district as credit to operation and maintenance charges only after it took over the care, operation and maintenance of its project, but that

these revenues would have to be appropriated by Congress.[9]

In *Chevron,* the Supreme Court reasoned the courts must defer to reasonable interpretations of statutes made by an administrator of an agency empowered to administer a congressionally created program. 467 U.S. at 843-44. Because there has been no consistent interpretation, rule, or regulation developed by the Bureau on this issue, the Court is not required to defer to its position herein.

The federal defendants also argue that even if the plaintiffs are entitled to Subsection I benefits, they are only entitled to revenues from lands south of Caballo reservoir. The defendants draw this line for three reasons. First, they maintain that wording in the 1937 contract entitles plaintiffs only to revenues below this line. Second, they claim the plaintiffs have not taken over care, operation, and maintenance of the "storage division" of the project, and because the "storage division" includes all the land above this line, they are not entitled to Subsection I revenues from that land. Finally, they argue that the plaintiffs never paid for the construction of either Elephant Butte Dam or Caballo Dam and therefore are not

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[9] These two internal memoranda contain the only references before the Court to the Rio Grande Project and the Hayden-O'Mahoney amendment. However, they were never presented to the Districts and were themselves contradicted by Bureau correspondence issued after 1979, when the Districts took over operation and maintenance.

entitled to revenue from the lands adjacent to the reservoirs. There is no justification for any of these arguments.

In the 1937 contracts the plaintiffs agreed to convey all their interests in the development of hydroelectric energy to the United States. In return, the United States relieved them of their obligation to reimburse the government for construction costs of the storage system (defined as Elephant Butte Dam and Reservoir and appurtenant works) chargeable to the development of power. Article 18 of the 1937 contract provided:

> That the net earnings of the power plant and system belonging to the United States and any other available revenues accruing to the United States by reason of Government ownership of the power plant and system[10] shall be applied in accordance with the provisions of the item in the Interior Department Appropriation Act, fiscal year 1938, as set out in Article 3 Hereof [sic].

Article 3 sets out in full the enabling statute that set the stage for the 1937 contracts. It states that the power revenues must be applied to "(1) the costs of power facilities, (2) the amount invested . . . in the cost of Elephant Butte Dam, and (3) the amount invested by the Bureau of Reclamation in Caballo

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[10] The contracts define "Power system" as "Power plants, trnasmission lines, etc., constructed for development of power."

Dam," and that after these costs have been met, "the net earnings of the power plant and system shall be disposed of as Congress may direct."

The contract is clear and unambiguous. Revenues accruing to the United States from the power system – power plants, transmission lines, and other facilities constructed for the development of power – were to be applied to offset the cost of the power facilities and the amounts invested by the United States in Elephant Butte and Caballo Dams. Other Subsection I revenues, that is, revenues from grazing lands, etc., are not revenues accruing from the power system, and should not be accruing to the United States under the terms of the 1937 contracts.

The contracts also divided the Project into two sections for purposes of operation and maintenance: the storage system and power system, and the remainder of the project (irrigation and drainage system). The storage system was defined as "Elephant Butte Dam and Reservoir and appurtenant works and the Caballo Dam and Reservoir and appurtenant works, and the power system was defined as "[p]ower plants, transmission lines, etc., constructed for the development of power." The irrigation and drainage system was defined as "all project works except the storage and power systems." The federal defendants argue that since plaintiffs have not taken over the care, operation, and maintenance of the storage division, they are not entitled to Subsection I credit from that division, and that all the lands from Caballo Dam north are included in the storage division.

First, in the 1937 contracts, the definition of the storage system does not include all the lands surrounding the reservoirs, or, as defendants suggest, all the lands north (but not south) of the reservoirs. Second, the storage system mentioned in the 1937 contracts, is not the same as a "storage division," as the word "division" is used in Subsection I. There is no indication that the drafters of Subsection I contemplated a project would be divided for purposes of operation and maintenance as the Rio Grande Project was divided in the 1937 contracts. Third, Subsection I itself states that when "water users take over the care, operation, and maintenance" of a division of a project, the "total accumulated net profits . . . shall be credited."

Finally, the federal defendants claim plaintiffs have not repaid the United States for the Subsection I lands in the storage system and are therefore not entitled to the revenues generated therefrom. It is true plaintiffs were relieved of the construction cost of Elephant Butte Dam in 1937 and, as a result of an agreement between the Departments of State and Interior, were not required to reimburse the reclamation fund for the construction of the Caballo Dam. However, there is no evidence these construction costs included the purchase of all the land from the borders of these reservoirs to the eastern, western, and northern limits of the Project. Nor is there evidence these costs were not included in the costs plaintiffs were required to repay to the fund.

NOW, THEREFORE,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment be granted and the federal defendants' crossmotion for partial summary judgment be denied. Plaintiffs are entitled to Subsection I credit for net profits from the "leasing of project grazing and farm lands," to the extent described herein.

The parties have 30 days from entry of this order to supplement the pre-trial order entered May 1, 1991, pursuant to Part III(d)(1) of that order.

/s/ Howard Bratton
HOWARD C. BRATTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE
IRRIGATION DISTRICT
OF NEW MEXICO and EL
PASO COUNTY WATER
IMPROVEMENT DISTRICT
NO.1 OF TEXAS,

Plaintiffs,

Civ. No. 90-95-HB

vs.

UNITED STATES
DEPARTMENT OF
THE INTERIOR, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Apr. 23, 1997)

The following motions are before the Court: (1) the parties' Cross-motions for Partial Summary Judgment as to Count II; (2) Federal Defendants' Motion for Summary Judgment as to Count V; and (3) Federal Defendants' Motion for Summary Judgment as to Count VI. Having reviewed the motions, the parties memorandum in support and in opposition, and the applicable law, the Court finds that the Plaintiffs' Motion for Partial Summary Judgment as to Count II is well taken and will be granted. Defendants' Joint Motion for Partial Summary Judgment as to Count II is not well taken and will be denied. Federal Defendants' Motion for Summary Judgment

as to Count V is granted. Federal Defendants Motion for Summary Judgment as to Count VI is granted.

I. Summary Judgment Standard

The Court may grant a motion for summary judgment only in cases where, looking at the facts in the light most favorable to the non-movant, there are no issues of material fact and the movant is entitled to judgment as a matter of law. *Thomas v. United States Dep't of Energy*, 719 F.2d 342, 344 (10th Cir. 1983); Fed. R. Civ. P. 56(c). The movant carries the burden of establishing that there are no genuine issues of material fact, *Adickes v. S. H. Kress*, 398 U.S. 144, 157 (1970), but may discharge its burden by showing there is an absence of evidence to support the non-movant's case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant meets its burden, the burden shifts to the non-movant to demonstrate a genuine issue for trial on a material matter. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). However, once the burden shifts to the non-movant, that party may not rest on its pleadings but must set forth specific facts showing there is a genuine issue for trial as to those dispositive matters for which it carries the burden *Celotex*, 477 U.S. at 324. If the non-movant cannot make such a showing, after adequate time for discovery, summary judgment is mandated. *Id.* at 322.

II. Motion for Summary Judgment as to Count V[1]

Count V of Plaintiffs' Amended Complaint asserts a claim seeking a declaratory judgment that Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (hereinafter "the Districts") "are legally and contractually entitled to receive title to the project works, excluding the reservoirs and works necessary for their protection." They request the Court order Federal Defendants to immediately transfer title to the Districts. According to Plaintiffs, "the return of the irrigation works has been authorized since the promulgation of the first Reclamation laws in 1902 and has been the understanding of the parties since the inception of their contractual relationship." Plaintiffs' Memorandum in Opposition to Federal Defendants' Motion for Summary Judgment as to Count V at 2, fn. 1. (hereinafter Plaintiffs' Response as to Count V).

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[1] Defendants' motion is more properly one for judgment on the pleadings. A judgment on the pleadings under Fed. R. Civ. P. 12(b)(c) is treated as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *McHenry v. Utah Valley Hosp.*, 927 F.2d 1125, 1126 (10th Cir.), *cert. denied*, 502 U.S. 894 (1991). The Court will grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). The Court must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991).

It is questionable whether the Court has the power to grant title to federal lands without an act of Congress. The sole authority to dispose of public lands is vested in Congress. U.S. Const. art. IV, §3, cl. 2[2]. Any grant of authority to convey public lands must be clearly stated and nothing is to be implied into the statutory language used by Congress. *United States v. Union Pac. R. Co.*, 353 U.S. 112, 116 (1957).

A. Reconveyance of the Project Irrigation Works Pursuant to Reclamation Law

Plaintiffs request the Court construe the language contained in Section 6 of the Reclamation Act of 1902 to give the Secretary of Interior the authority to convey Project lands to the Districts without further Congressional action. Section 6 of the Reclamation Act enacted in 1902 provides as follows:

> The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act. Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the

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[2] Article IV, § 3, cl. 2 provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

> works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

43 U.S.C. §§ 491, 498 (1986), 32 Stat. 389. Plaintiffs argue that Section 6 first directs the Secretary to operate and maintain all reservoirs and irrigation works by using the reclamation fund. According to Plaintiffs, Section 6 then provides that, at a certain point, control over the irrigation works was to be turned over to the project water users. Plaintiffs acknowledge that Section 6 does not expressly use the word "title" when it provided that management of the irrigation works was to pass to the project members. However, because the last sentence of Section 6 clearly and unambiguously provides that title, management, and operation of the "reservoirs and the works necessary for their protection and operation" shall remain in the Government until otherwise provided by Congress, Plaintiffs contend that the absence of similar language in the second sentence of Section 6 authorizes the Secretary to turn over title to the irrigation works to the Districts without future Congressional action. Plaintiffs claim that because of

this statutory ambiguity, the Court must examine the circumstances existing at the time the 1902 Reclamation Act was enacted.

Section 6 clearly and unambiguously provides that " . . . the *management and operation* of such irrigation works shall pass to the owners of the lands irrigated thereby. . . . " The Court will not read a Congressional intent to convey title to the irrigation works from this language. The only express grant of authority to transfer title to the Districts of any property that is part of the Rio Grande Project is the authority recently given to the Bureau of Reclamation in Pub.L. 102-575, § 3301. This section provides:

> The Secretary is authorized to transfer to the Elephant Butte Irrigation District, New Mexico, and El Paso County Water Improvement District No. 1, Texas, without cost to the respective district, title to such easements, ditches, laterals, canals, drains, and other rights-of-way, which the United States has acquired on behalf of the project, that are used solely for the purpose of serving the respective district's lands and which the Secretary determines are necessary to enable the respective district to carry out operation and maintenance with respect to that portion of the Rio Grande Project to be transferred. The transfer of the title to such easements, ditches, laterals, canals, drains, and other rights-of-way located in New Mexico, which the Secretary has, that are used for the purpose of jointly serving Elephant Butte Irrigation District and El Paso County Water

> Improvement District No. 1, may be transferred to Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, jointly upon agreement by the Secretary and both districts. Any transfer under this section shall be subject to the condition that the respective district assume responsibility for operating and maintaining their portion of the project.

If Plaintiffs' contentions were correct, Congress would not have had to enact Pub.L. 102-575, authorizing the Secretary to transfer to the Districts " . . . title to such easements, ditches, laterals, canals, drains, and other rights-of-way, which the United States has acquired on behalf of the project. . . ." Moreover, had Congress intended to convey other Project lands to the Districts, it would have done so in Pub.L. 102-575, § 3301.

B. Reconveyance of the Project Irrigation Works Pursuant to Contract

Plaintiffs also contend they are contractually entitled to reconveyance of title to the irrigation works. Plaintiffs concede there was no provision for transfer of title to the irrigation works to the Districts in the June 15, 1918 contract and the 1937 contract. Plaintiffs' Response as to Count V at 36. Plaintiffs claim, however, that "the irrigation districts understood that when project costs were fully repaid by them in 1971 (EBID) and 1975 (El Paso District No. 1), then title as well as operation and maintenance of

the irrigation works would be returned to them." *Id.* at 37. Plaintiffs rely on the February 15, 1979 contract. Plaintiffs argue that since the 1979 contract addressed "transfer of District Works" and listed and identified irrigation works on Exhibit A to the contract, such identified canals, laterals, and drains "were a determination by Federal Defendants that these were not 'necessary' for the protection and operation of the reservoirs." *Id.* at 38. Plaintiffs argue upon execution of the contract, the United States was to transfer to Plaintiff EBID the transferred District works as identified on Exhibit A.

According to Plaintiffs, the 1979 contract provides for separate duties and liabilities relating to the "transferred District works." First, the United States "shall transfer" to EBID the "transferred District works" identified in Exhibit A attached to the contract, and second, the district "shall assume" the operation and maintenance of the transferred works so identified. Plaintiffs argue this would imply that "transfer" implies title to the District works rather than just transfer of the operation and maintenance of the District works. However, Plaintiffs concede the term "transfer" is not defined by the contract. The Court cannot accept Plaintiffs interpretation of the 1979 contract. The contracts with the Districts speak only of the transfer of the operation and maintenance of the irrigation works and never expressly mentions title to Project lands. Accordingly, Federal Defendant's Motion for Summary Judgment as to Count V is granted.

II. The Parties' Cross-motions for Partial Summary Judgment as to Count II

In 1962, Congress enacted 76 Stat. 171, which "provided for the establishment and administration of basic public recreation facilities at the Elephant Butte and Caballo Reservoir areas." The Act also authorized the Federal Defendants to enter into an agreement with a subdivision of the State of New Mexico for the administration, operation, and maintenance of the public recreation facilities. Subsequent to passage of 76 Stat. 171, the Federal Defendants executed two lease agreements with the State of New Mexico for the administration, operation, and maintenance of the authorized recreational facilities. The first lease was executed in 1964 and the second in 1973.[3] Under the lease agreements, the Federal Defendants assigned to the State Defendants the right to revenues generated from Project lands. The lands encompassed by the lease agreement with the State Defendants historically constituted grazing and farm lands of the Rio Grande Project, and the Project was historically credited with the "net profits" from these lands.

Plaintiffs assert that 76 Stat. 171 did not authorize Federal Defendants to transfer *existing* revenue producing leases to the State of New Mexico.

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[3] The Parties entered into the 1964 and 1973 contracts pursuant to the Reclamation Act of 1902, 32 Stat. 388 and the Act of July 25, 1962, Pub.L. 87-542, 76 Stat. 171.

According to Plaintiffs, revenues previously credited to the Project are now turned over to the State of New Mexico. Plaintiffs' Response as to Count II at 6. Because they are entitled to revenues generated from Project lands pursuant to Subsection I of the Fact Finder's Act, Plaintiffs claim Federal Defendants did not have statutory authority to assign Rio Grande Project land revenues to the State Defendants in the 1973 Lease Agreement.[4] Plaintiffs request the Court declare the lease ultra vires and void or in the alternative, that the lease be reformed to provide the Plaintiffs with revenue credits as mandated by Subsection I of the Fact Finder's Act.

The Court will first address the Defendants' argument that the statute of limitations bars Count II as to the Federal Defendants pursuant to 28 U.S.C. § 2401. Section 2401 provides that:

> . . . every civil action commenced against the United States shall be barred unless the

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[4] In its September 3, 1992 Memorandum Opinion and Order, the Court found Plaintiffs were entitled to receive credits from revenues generated from Project lands under Subsection I. Subsection I of the Fact Finder's Act of 1924 mandates that "the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites, shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct." 43 U.S.C. § 501

> complaint is filed within six years after the right of action first accrues.

The six year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and must be strictly construed. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

"It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the Plaintiff to institute an action." *Id.* at 1577. For the purposes of § 2501, "a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Id.*

In response to Federal Defendants' statute of limitations argument, Plaintiffs contend the "continuing claim" doctrine is applicable to this action. On October 29, 1990, Plaintiffs filed amended pleadings to assert claims only for prospective relief, in the form of reformation of the current 50 year lease with the State Defendants, and for accountings and credits against operation and maintenance charges which accrued after January 25, 1984, six years prior to the filing of the complaint. Under the continuing claim doctrine, these claims for the resulting damages

occurring within six years prior to the filing of the. complaint would not be barred by § 2501.

Under the continuing claim doctrine, where payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought, even where the grounds or basis for the refusal to pay took place or were enacted more than six years prior to the action. *Friedman v. United States*, 310 F.2d 381, 385, 159 Ct.Cl. 1 (1962); *see also, Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) (unlawful termination of tribe's status could result in certain injuries which fall within the continuing claim doctrine sufficient to remove claims for the resulting damages occurring within six years of the complaint from the bar of § 2501). "The rationale underlying the continuing claim doctrine is that it prevents the defendant from escaping all liability for its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501." *Hopland*, 855 F.2d at 1581.

In this case, the Districts' rights are to annual credits against operation and maintenance charges from net revenues generated from Project lands pursuant to Subsection I of the Fact Finder's Act. The Court finds the continuing claim doctrine applicable. Therefore, claims which accrued within six years prior to the filing of the Complaint are timely.

State Defendants also claim Count II is barred by the statute of limitations. However, the Court

previously rejected State Defendants' statute of limitations and laches arguments at the October 19, 1990 hearing. The Court entered an Order on the same day denying State Defendants' Motion for Summary Judgment.

Defendants next contend Congress intended to provide recreational facilities at water projects and these facilities could not operate without the revenues they now receive. Citing the Act of July 25, 1962, Pub.L. 87-542, 76 Stat. 171, and the Federal Water Project Recreation Act ("Recreation Act"), Pub.L. 89-72, 16 U.S.C. § 4601-12, Defendants contend "Congress has the authority to affect revenues in subsequent acts" and "to establish a policy favoring recreational use of water projects." Defendants further argue the Act of July 25, 1962 and the Recreation Act authorized a new use of the federal land, i.e., recreation. According to Defendants, this new land use also created a new revenue stream from recreational activities that did not exist at the time the Fact Finder's Act was enacted. Pursuant to the Recreation Act, Congress directed that the revenue from this new use be deposited into the Treasury and not to the Districts. In this case, Defendants claim that any revenues received by the Bureau of Reclamation (BOR) pursuant to the lease with the State are now required by law to be deposited into the Treasury as miscellaneous receipts. However, under the lease with the State, the BOR receives no revenues but requires the State use any excess fees for improvements and operations of Elephant Butte and Caballo

State Parks. Simply stated, Defendants argue the Act of July 24, 1962 and the Recreation Act, by implication, modified Plaintiffs' rights to Subsection I credits.

The Court has reviewed the Act of July 25, 1962 and the Recreation Act and finds nothing in those Acts modified Plaintiffs' right to Subsection I credits. The Act of July 25, 1962 explicitly states in pertinent part:

> That the Secretary of the Interior is authorized and directed to investigate, plan, construct, operate, and maintain basic recreation facilities at Elephant Butte and Caballo Reservoirs, Rio Grande Federal reclamation project, New Mexico . . . and to provide for the public use and enjoyment of such recreation facilities and the water areas of such reservoirs in such manner as is consistent with the *primary purpose* of such project. (Emphasis added).

76 Stat. 171, § 2. This express language recognizes the primary purpose of the Rio Grande Project was not to be adversely affected by 76 Stat. 171. Contrary to Defendants' contention, that in enacting 76 Stat. 171 Congress intended to establish a policy favoring recreational use of water projects, the reading of this Act indicates the primary purpose of the project was irrigation and not recreation and this primary purpose was not to be adversely affected. *See also, Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (construing similar language,

"consistent with the primary purpose" in a reclamation project and finding recreation not a primary purpose).

In construing the relationship between the Recreation Act and Subsection I of the Fact Finder's Act, the Commissioner of Reclamation issued a memorandum on February 28, 1967, and opined that Subsection I was unaffected by the Recreation Act. The Commissioner stated in pertinent part:

> The above interpretation of the relationship between Subsection I and section 2(a) of P.L. 88-578 preserves contract rights by viewing recreation revenues as lease revenues from project grazing and farm lands, even if the contract does not expressly refer to recreation revenues as lease revenues. Under the interpretation any kind of revenue from project grazing and farm land is viewed as protected.
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> * * *
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> Rights in revenues preserved by contracts would pertain whether or not the lands were retained in the jurisdiction of the Bureau of Reclamation or transferred to another agency such as the Forest Service. *The amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease.* To apply to the contract additional revenue generated by recreational development undertaken with appropriated

> funds would constitute, in our opinion, an unauthorized gift of federal property. (Emphasis added).

For the foregoing reasons, the Court finds that the Districts are entitled to continue receiving Subsection I credits, at least credits equivalent to what they were previously entitled to prior to the development of the recreational facilities. However, the Court also recognizes the State's need to continue to receive funds to administer, operate, and maintain the recreational facilities. Accordingly, Defendants' Joint Motion for Partial Summary Judgment is denied and Plaintiffs' Motion for Partial Summary Judgment is granted. The Court will set a hearing to reform the lease to provide the Plaintiffs with revenue credits as mandated by Subsection I of the Fact Finder's Act.

III. Defendants' Motion for Summary Judgment as to Count VI

Count VI of the Districts' Amended Complaint seeks an order terminating the current memorandum of understanding ("MOU") between the BOR and the Bureau of Land Management ("BLM"). Since the 1940s, the BOR and BLM entered into a MOU concerning administration of lands for grazing purposes around Elephant Butte and Caballo Reservoirs.

The original 1941 MOU covered only lands around Caballo Reservoir and provided for BLM to charge grazing fees at least equal to the rate charged on adjacent grazing lands administered by BLM

under the Taylor Grazing Act and recognized that for the most part the lands were similar in character for grazing purposes. The 1941 MOU also provided for the BLM to collect all grazing fees and pay them over to BOR for disposal under reclamation law. In 1949, the lands around Elephant Butte Reservoir were added to the MOU.

In 1942, the grazing fees for use of both BLM and BOR lands were agreed to be identical. In 1972, the BLM and BOR entered into a national MOU that provided for deposit of all grazing fee collections on reclamation lands to be deposited in the Treasury for credit to the loan repayment account for the project.

In 1976, Congress enacted the Federal Land Policy and Management Act ("FLPMA") which required the development of allotment management plans to improve range conditions and better resources. See 43 U.S.C. § 1752(d). Because BOR does not have any expertise in developing such plans and because BLM has extensive experience in the techniques, costs and goals of rangeland management, in 1983, the BLM and BOR entered into a revised national MOU which provided reimbursement by each agency for services rendered. With respect to grazing, the 1983 MOU stated:

> When authorized by Reclamation, revenues or fees collected may remain with BLM to serve as Reclamation's reimbursement for work performed.

The BOR and the BLM entered into the current MOU on November 17, 1987. The 1987 MOU authorized BLM to use a portion of the revenues collected from grazing fees to offset administrative costs incurred with respect to such lands and to make range improvements on these lands.[5] BLM also is authorized to lease out and manage the BOR lands. 43 C.F.R. Part 4100. Grazing fees are set by Executive Order under the guidance of Section 401 of the FLPMA, now codified as 43 U.S.C. § 1751, Section 6 of the Public Rangelands Improvement Act, now codified as 43 U.S.C. § 1901, et seq., and BLM's regulations at 43 C.F.R. § 4130.7-1. Under the Economy Act, BLM is entitled to recover its costs of administration from the lease revenues it collects on behalf of BOR. According to Federal Defendants, if the Court were to terminate the MOU, BOR would incur the cost of administration and the cost would likely be higher. Moreover, Defendants claim because management costs are now being deducted from the gross lease receipts there is little or no "net profit" to

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[5] The 1987 MOU states in pertinent part:

> The BLM shall be responsible for collecting revenues from grazing leases on Project lands and transferring appropriate funds into proper accounts according to Federal laws and regulations. A portion of these collected revenues shall be used by BLM for administration of grazing on Project lands and for construction and maintenance of improvements, including those requested by Bureau of Reclamation on Project lands.

credit to the Districts under the provisions of Subsection I of the Fact Finder's Act of 1924.[6]

Plaintiffs assert the current management arrangement between the BLM and BOR regarding Rio Grande Project lands is not in their best interest. Plaintiffs contend Federal Defendants have breached their fiduciary duties because the arrangement with BLM generates little if any profit from the grazing lands for crediting to the Plaintiffs' operation and maintenance expenses of the Project.

Plaintiffs cite *United States v. Mitchell*, 463 U.S. 206 (1983), in support of their claim that a fiduciary relationship exists between the Secretary and the Districts. However, *Mitchell* involved a federally recognized Indian Tribe. In *Mitchell*, the Court recognized the "undisputed existence of a general trust relationship between the United States and the Indian people," and emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Mitchell*, 463 U.S. at 225. Although Plaintiffs are entitled to Subsection I credits under Fact Finder's Act, this alone is not a legal basis upon which the Court can conclude that a fiduciary

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[6] Pursuant to Subsection I of the Fact Finder's Act, the Federal Defendants are required to credit net profits generated from Project grazing and farm lands on an annual basis toward the Plaintiffs' operation and maintenance expenses of the Project.

relationship exists between the District and the United States.

Plaintiffs also contend "the Secretary owes fiduciary duties to them under Subsection I of the Fact Finder's Act." Plaintiffs' Response as to Count IV at 6. However, Subsection I only directs how the revenues from Project lands are to be disposed. It does not create a fiduciary duty to the Districts.

Plaintiffs further assert the Secretary has a duty to generate profits pursuant to Subsection I. According to Plaintiffs, proper management of Project lands would require competitive bidding of grazing charges. However, according to Mr. Miles Brown, the BLM official in charge of administration of the grazing leases, competitive bidding would not bring greater revenues than are now being generated. Defendants' Reply as to Count VI, Exhibit B, pp. 111-116.

The Reclamation Act of 1902 grants the Secretary of Interior broad authority "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." 43 U.S.C. § 373. Management of Project lands falls within this authority and are matters completely within the Secretary's discretion. *Cf., Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996) (no court has the power to order the BLM or the Department of Interior to grant a grazing lease; determination of whether public lands should even be designated for grazing purposes are matters completely within Secretary's

discretion). The Court has no authority to require the Secretary to employ competitive bidding of grazing charges or to turn over management of the Project lands to the Districts.

Finally, although the Court finds that Plaintiffs are entitled to Subsection I credits under the MOU, Plaintiffs concede that no profits are being generated under the current management plan. In fact, Defendants assert the only reason the Districts had been receiving grazing revenues in the past was because BOR and BLM had not been charging administration costs or the costs of range improvement to the Districts. Plaintiffs have not disputed this assertion. The Court finds that the Districts have not demonstrated the terms of the MOU are arbitrary, capricious or contrary to law. Therefore, Federal Defendants' Motion for Summary Judgment as to Count VI is granted.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment as to Count II is granted. Defendants' Joint Motion for Partial Summary Judgment as to Count II is denied.

IT IS FURTHER ORDERED that Federal Defendants' Motion for Summary Judgment as to Count V is granted.

IT IS FURTHER ORDERED that Federal Defendants Motion for Summary Judgment as to Count VI is granted.

/s/ Howard Bratton
HOWARD C. BRATTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE
IRRIGATION DISTRICT
OF NEW MEXICO, EL
PASO COUNTY WATER
IMPROVEMENT DISTRICT
NO. 1 OF TEXAS,

Plaintiffs,

Civ. No. 90-95 JP/JHG

vs.

UNITED STATES
DEPARTMENT OF
THE INTERIOR; et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Jan. 16, 2003)

On April 1, 2002 the Federal Defendants filed a Motion for Summary Judgment (Doc. No. 336). The State Defendants filed a memorandum of law in support of the Federal Defendants' motion. On June 3, 2002, Plaintiffs filed a Motion to Strike the State Defendants' Memorandum of Law along with their response to the State Defendants' memorandum of law (Doc. No. 339). Based on a careful review of the pleadings, the prior opinions and orders of this Court and of the Tenth Circuit Court of Appeals, other relevant case law, the exhibits of record, and the arguments of counsel, the Court concludes that the

motion for summary judgment should be GRANTED in part and DENIED in part.

As a preliminary matter, Plaintiffs request that the State Defendants' Memorandum in Support of the United States' Motion for Summary Judgment be stricken, or in the alternative that the State Defendants must be bound by this Court's decision as to Count II. It was proper for the State Defendants to file their memorandum brief, and there has never been a suggestion that they will not be bound by the Court's decision. Therefore, Plaintiffs' Motion to Strike will be denied.

Background and Procedural History.

The Rio Grande Project ("the Project") is a federal reclamation project undertaken by the Bureau of Reclamation ("BOR") in the early years of the twentieth century. It was authorized by Congress in 1905, 33 Stat. 814. Initially the Project was directed at the irrigation needs of farmers in the lower Rio Grande valley of New Mexico and the upper Rio Grande valley of Texas, and that remains its primary purpose. Over the years, the Project has been utilized for delivery of water to Mexico under an international treaty, for power generation needs and recreation uses, and for municipal water needs for Las Cruces, New Mexico and El Paso, Texas. Other incidental uses of Project lands have included grazing and development of township and residential sites.

The Complaint in this case was filed in 1990 by Plaintiff Elephant Butte Irrigation District ("EBID"), with El Paso County Water Improvement District No. 1 ("El Paso") as an involuntary Plaintiff. Federal Defendants are the United States Department of the Interior ("DOI") and its Secretary, and two officials of the United States Bureau of Reclamation ("BOR"). The remaining State Defendants are the Governor of the State of New Mexico and the Secretary of the New Mexico Energy, Minerals and Natural Resources Department.[1]

The case has proved to be a complex one. Over the years the judge to whom the case was assigned, the late Honorable Howard C. Bratton, entered numerous orders and two major memorandum opinions. The case has been appealed twice to the Tenth Circuit Court of Appeals, which affirmed Judge Bratton's rulings. It is here on remand from the Tenth Circuit for resolution of the remaining issues. All issues in all the counts of the Complaint have been resolved, save those raised in Count II. The Court will discuss two other counts, Count I and Count VI, insofar as they bear on the issues remaining in Count II.

In Count I, the water districts contended they were entitled to net profits from grazing leases on

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[1] The Court previously dismissed the State of New Mexico and the New Mexico Department of Energy, Minerals and Natural Resources on Eleventh Amendment immunity grounds.

Project lands under Subsection I of the Fact Finder's Act, 43 U.S.C. § 501. The grazing leases had been issued by the United States Bureau of Land Management ("BLM") or its predecessor agency the United States Grazing Service under a series of memoranda of understanding with BOR that were executed between 1941 and 1983. In a Memorandum Opinion and Order filed September 3, 1992, the Court granted summary judgment to Plaintiffs on Count I, holding that Plaintiffs were entitled to receive credits for net profits generated from grazing leases on Project lands under Subsection I of the Fact Finder's Act. The Court ordered the Secretary of Interior to come up with a calculation of net profits; that issue was resolved on October 17, 1996, when Plaintiffs and DOI stipulated to the amount of the Subsection I net profits for grazing leases under Count I.

The current Memorandum of Understanding ("MOU") between BOR and BLM, which was executed in 1987, contains a different way of calculating profits from grazing leases that virtually ensures no net profits will be realized. In October 1993, Plaintiffs filed an Amended Complaint adding Count VI, which sought termination of the current MOU because it deprives Plaintiffs of credits under Subsection I for net profits on the grazing leases. In a April 23, 1997 Memorandum Opinion and Order, the Court granted the Federal Defendants' motion for summary judgment on Count VI, holding that the Federal Defendants had no fiduciary duty to generate net profits for the water districts under the grazing leases.

In Count II, Plaintiffs challenged the United States' recreation lease with the State of New Mexico under which all lease revenues are assigned to the State. The current recreation lease was executed in 1973 for a 50-year term. It replaced the first recreation lease which was executed in 1964. The lease allows for the creation and operation of the Elephant Butte State Park and the Caballo Lake Park on 25,730 acres of Reclamation land in the Rio Grande Project. Some of this land had previously been under grazing leases that had produced net revenues that were credited to Plaintiffs under Subsection I of the Fact Finder's Act. The two State Parks are operated and maintained by the State of New Mexico. None of the revenues generated by the State under the 1973 recreation lease are to be paid to the United States, effectively depriving Plaintiffs of any credits for net profits under Subsection I of the Fact Finder's Act as to those lands covered by the recreation lease.

Plaintiffs alleged in Count II that the net profits generated by the State of New Mexico under the recreation lease should be credited to the water districts under Subsection I of the Fact Finder's Act. It its April 23, 1997 Memorandum Opinion and Order, the Court ruled that the water districts are entitled to continue receiving Subsection I credits, subject to the State's necessary expenses in administering, operating, and maintaining the recreational facilities. The Court denied the Federal Defendants' and the State Defendants' joint motion for partial summary judgment

on Count II, and granted Plaintiffs' cross-motion for partial summary judgment on Count II, stating:

> [T]he Court finds that the Districts are entitled to continue receiving Subsection I credits, at least credits equivalent to what they were previously entitled to prior to the development of the recreational facilities. However, the Court also recognizes the State's need to continue to receive funds to administer, operate, and maintain the recreational facilities. Accordingly, Defendants' Joint Motion for Partial Summary Judgment is denied and Plaintiffs' Motion for Partial Summary Judgment is granted. The Court will set a hearing to reform the lease to provide the Plaintiffs with revenue credits as mandated by Subsection I of the Fact Finder's Act.

Mem. Op. & Order, Apr. 23, 1997 at 14-15.

Plaintiffs filed a motion for clarification in which they maintained there was an inconsistency in the Court's rulings on Counts II and VI. On June 24, 1999 the Court issued a clarification of its April 23, 1997 Memorandum Opinion and Order, but refused to amend or alter its previous rulings. In its clarification Order, the Court stated:

> The Districts' rights are to annual credits against operation and maintenance charges from **net revenues** generated from Project lands pursuant to Subsection I of the Fact Finder's Act. In response to Defendants' Motion for Summary Judgment as to Count

> VI, Plaintiffs conceded that no profits were being generated under the existing management plan. Therefore, although the Court found that Plaintiffs were entitled to Subsection I credits under the MOU, the Court deferred to the Secretary's broad authority to manage project lands, which is a matter completely within the Secretary's discretion. The fact that no profits are being generated under the MOU does not mean that an inconsistency exists between the Court's ruling regarding Count II and Count VI.

Order, June 24, 1999 at 3 (emphasis in original).

On appeal, Defendants challenged the Court's summary judgment for Plaintiffs on Count I, and Plaintiffs cross-appealed the Court's resolution of Count VI in favor of Federal Defendants. In an October 21, 2001 opinion, the Tenth Circuit Court of Appeals affirmed the District Court on both issues. *Elephant Butte Irr. Dist. of New Mexico v. United States Dep't of Interior*, 269 F.3d 1158 (10th Cir. 2001). Thus, it is established in this circuit that the Fact Finder's Act has not been repealed by subsequent legislation and still applies to Project lands, and that Plaintiffs' right to credits under the Fact Finder's Act is an entitlement which does not carry with it any fiduciary duty on the part of the Federal Defendants to generate or maximize profits for the benefit of the water districts.

After the case was reassigned to me, on November 15, 2001 I wrote to the parties requesting their

input on the status of the case and the issues remaining after the Tenth Circuit's decision. After receiving written responses, I held a status conference on January 30, 2002. Plaintiffs contended that wide-ranging discovery was warranted, while the Defendants asserted that no discovery was needed or allowed. Thinking that more detailed written submissions would assist the Court in deciding the remainder of the case, I invited the Federal Defendants to file the present motion for summary judgment.

The Present Dispute.

The Federal Defendants and the State Defendants first argue that reformation of the recreation lease is not appropriate, essentially suggesting that Judge Bratton decided Count II incorrectly, or that the Tenth Circuit's opinion changes the basis of Judge Bratton's decision. They contend that the lease should not be reformed to grant credits to Plaintiffs for revenues generated by the recreation lease because Plaintiffs are only entitled to net revenues from grazing, not recreation. Plaintiffs support Judge Bratton's rulings on Count II, and maintain that they are entitled to credits for all net profits, if any, generated under a reformed recreation lease.

The State Defendants separately argue that an order modifying the recreation lease to require the State to pay net profits to the United States is inappropriate because it is not mandated by federal law and would conflict with state law. The State

Defendants contend that payment of the State's net profits to the United States would constitute an expenditure made without legislative approval and would interfere with discretionary acts of State Officials.

Alternatively, Defendants contend that if the recreation lease should be and is modified, the modification should recognize that there is no obligation on the part of the federal government to maximize revenues or to produce net profits from the recreation lease. They contend that crediting of net profits to Plaintiffs under Subsection I of the Fact Finder's Act is only required when and if profits are generated in the normal course of business, given the State's need for revenues to maintain and operate the State Parks. Although Plaintiffs recognize that the Tenth Circuit's affirmance of this Court's disposition of Count VI means that the federal government has no fiduciary duty to produce net profits under the recreation lease, they insist that the Court should impose some sort of business acumen standard, under which it would somehow behoove the United States to require the State of New Mexico to generate profits, so that credits would accrue to the benefit of Plaintiffs. Plaintiffs also contend that at a minimum, they are entitled to receive credits in the amounts they had been receiving under grazing leases prior to the execution of the recreation lease.

Two additional points made by the Federal Defendants do not appear to be contested by Plaintiffs.

First, they suggest that the reformed lease should contain a clause stating that the Secretary of Interior is responsible for determining whether the recreation lease produces a net profit to be credited to Plaintiffs under Subsection I. Second, the Federal Defendants maintain that state revenues are not federal revenues, and that the term "net profits" in Subsection I refers only to moneys paid to the federal government which are in excess of the federal government's costs in administering the recreation lease.

1. Appropriateness of reformation of recreation lease.

Subsection I of the Fact Finder's Act provides:

> Whenever the water users take over the care, operation, and maintenance of a project . . . the total accumulated net profits, as determined by the Secretary [of Interior], derived from the . . . leasing of project grazing and farm lands . . . shall be credited to the construction charge of the project . . . and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, [and] second, on account of project operation and maintenance charge. . . .

43 U.S.C. § 501.

Defendants contend that the recreation lease should not be reformed because only grazing and farm leases give rise to Subsection I credits, not the

recreation lease. Plaintiffs, on the other hand, interpret the Fact Finder's Act to mean that Subsection I benefits flow from any leases on Project grazing and farm lands. This issue was considered by Judge Bratton, who apparently believed that Subsection I of the Fact Finder's Act applies not only to grazing leases, but to the recreation lease as well. Judge Bratton found:

> The lands encompassed by the lease agreement with the State Defendants historically constituted grazing and farm lands of the Rio Grande Project, and the Project was historically credited with the 'net profits' from these lands.

Mem. Op. & Order, April 23, 1997 at 8-9. Thus, Judge Bratton agreed with Plaintiffs' interpretation of the statute. This is a reasonable interpretation of the language of the statute, and it has not been negated by the Tenth Circuit's opinion, notwithstanding Federal Defendants' complex, extensive, and forceful arguments to the contrary. It is clear that Judge Bratton intended to reform the recreation lease to provide credits to Plaintiffs for any net profits from the recreation lease, and I see no reason to alter Judge Bratton's ruling on this point.

The State Defendants argue that an order modifying the recreation lease to require the State to pay net profits to the United States would conflict with state law because it would result in an expenditure of state funds without legislative approval in violation of N. M. Stat. Ann. § 16-2-11(J), which provides:

> Any acquisition of land or any interest in land for state park or recreation purposes shall be approved by the legislature prior to the execution of a written agreement binding the state to expenditure of funds for acquisition or development of state parks or recreation areas.

However, the reformed lease would not "bind" the State to expend funds to acquire or develop the recreation areas in the state parks; it would only bind the State to pay net profits, if any, to the United States. Moreover, a clause in the existing lease gives the State the option to terminate the lease without cause upon proper notice to the BOR. Pl. Ex. 2, Section 20(c), at 10. For the same reasons, the State Defendants' other argument, that reformation of the recreation lease would interfere with discretionary acts of State officials, does not negate the propriety of reforming the recreation lease. Additionally, as noted by the Tenth Circuit in its ruling on application of the *Ex parte Young* doctrine in this case, discretionary acts by state officials that violate federal law are not afforded deference. *Elephant Butte Irr. Dist. of New Mexico v. Dep't of Interior*, 160 F.3d 602, 611 (10th Cir. 1998).

2. *No duty of Secretary of Interior to produce net profits under recreation lease.*

Plaintiffs suggest that even though the Court cannot require the Secretary to maximize revenues or generate profits on the grazing leases, the Court can

somehow reform the recreation lease to require profits. Plaintiffs note that Judge Bratton found that under Count VI the Irrigation Districts had failed to rebut evidence that no net profits could be generated where grazing leases were subject to nationally-determined grazing fees and subject to new types of expenses for improvements and management by BLM; also, competitive bidding of grazing leases on Project lands would not bring greater revenues than are now being generated. *See* Mem. Op. & Order, April 23, 1997 at 15-18.[2] These factual matters, however, were merely alternative findings. The basis for Judge Bratton's ruling on Count VI, and for the Tenth Circuit's affirmance of that ruling, was that the United States owes no fiduciary duty to the Irrigation Districts to produce profits under the grazing leases, a ruling that applies equally to the recreation lease. Lease reformation under Count II may provide relief for Plaintiffs because as a factual matter the possibility exists that profits may be generated under the recreation lease in the future. Under this interpretation, the only reformation allowed is simply to require that if there are net profits in the future, those net profits must be credited to Plaintiffs.

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[2] Plaintiffs also observe that no evidence has been presented that the State of New Mexico is not generating net revenues from the fees it charges at the state parks. These fees include entrance fees, camping fees, cabin lot leases, concession fees, etc.

Even though they acknowledge the import of the ruling regarding lack of fiduciary duty under the grazing leases in Count VI on their claim under the recreation lease in Count II, Plaintiffs suggest that there exists a "non-fiduciary but nevertheless significant responsibility of the Secretary to manage Project lands in a certain manner." Pl. Resp. at 22. Plaintiffs state that this alleged responsibility requires exploration at the reformation hearing, and they suggest that its source is contained in the "statutory guides" of the 1924 Act and/or the 1926 Act. *Id.* Plaintiffs interpret the language in the 1924 Fact Finder's Act requiring the crediting of "the total accumulated net profits," 43 U.S.C. § 501, to impose not a fiduciary duty but rather a business standard on the Secretary in managing Project lands. In the 1926 Omnibus Adjustment Act, 43 U.S.C. §§ 423-423g, 610, Congress directed the Secretary to administer the Act for the rehabilitation and future success of the several reclamation projects by placing the projects on "a sound operative and business basis." 43 U.S.C. § 432f. Plaintiffs' theory is that because businesses make profits and governments do not, the Court can somehow reform the recreation lease to impose a requirement to make profits on the Secretary under the recreation lease. Plaintiffs insist that the Secretary must consider their rights and entitlements in granting the recreation lease, and must redirect revenues from the State to the credit of the Irrigation Districts.

This Court rejects Plaintiffs' theory. The Tenth Circuit has already found that the combination of

these two Acts does not impose a fiduciary duty on the Secretary to generate profits for the Irrigation Districts. The same applies to Plaintiffs' theory that the Acts create a business standard, or that they give some sort of mandatory guidance to the actions of the Secretary. This Court cannot order the United States to require profits to be generated by the State under the recreation lease any more than it could order profits to be generated under the grazing leases. Such an order is precluded under the analysis of Count VI performed by this Court and affirmed by the Tenth Circuit Court of Appeals. Thus, the reformed recreation lease will not require the Secretary either to generate revenues or to maximize profits.

3. No minimum credits for Plaintiffs.

Plaintiffs argue that there is a "floor" for credits under a reformed recreation lease, which they suggest is the amount of credits from grazing leases and other sources that was being received by the Irrigation Districts prior to the 1964 recreation lease. Plaintiffs seem to assert that Judge Bratton meant to reform the recreation lease at least to reinstate credits the Irrigation Districts had been receiving before the revenue sources that produced the credits were turned over to the State under the recreation lease. Plaintiffs also suggest that Judge Bratton perhaps intended to provide even more relief for the Irrigation Districts. Plaintiffs base their claims on the language in Judge Bratton's memorandum opinion, quoted above, which mentioned the credits Plaintiffs

were entitled to prior to development of the recreational facilities, and recognized the State's need for revenues related to administration, operation, and maintenance of those facilities. Plaintiffs contend that the Court should hear evidence on what the Irrigation Districts believe they are entitled to under this theory of the case, as well as on the State and Federal Defendants' positions.

This Court does not agree that Plaintiffs are entitled to certain minimum credits. The extent to which credits were being received by the Irrigation Districts prior to the first recreation lease in 1964, which turned over sources of revenue to the State, is immaterial. Unless there is a duty on the part of the United States to produce net profits, there can be no minimum credits due to Plaintiffs under Subsection I of the Fact Finder's Act.

4. Other matters.

Two final matters brought up by the Federal Defendants and not contested by Plaintiffs should be addressed. First, the Federal Defendants maintain that the only relevant net profits are those accruing to the United States. The Court agrees. Count II requests that Plaintiffs be credited in the amounts of the State's net profits. *See* Complaint, ¶¶ 57, E at 20, 21 (as amended). If the United States has expenses related to the recreation lease, those expenses may be deducted from whatever revenues may be turned over to the United States by the State under the reformed

lease for the purpose of determining the United States' net profits. The credits to Plaintiffs under Subsection I of the Fact Finder's Act will be in the amount, if any, of the United States' net profits.

Second, the Federal Defendants want the reformed lease to specify that the determination of "net profits" will be made by the Secretary. The Court sees no harm in including a clause of this type in the reformed lease.

5. Summary.

The Court will have the parties propose drafts of the pertinent provisions of the reformed lease, informed by the rulings in this Memorandum Opinion. To summarize, the recreation lease will be reformed to require the State to account for and to turn over to the United States any net revenues the State might realize from its operation of the State Parks after deducting from gross revenues the State's expenses for administration, operation, and maintenance of the recreational facilities. There is no duty on the part of the United States to generate profits, or to require the State of New Mexico to generate profits, under the recreation lease. The reformed lease may contain a clause providing that the Secretary of Interior is responsible for determining whether the United States receives a net profit under the recreation lease.

No minimum credits are to be granted to Plaintiffs under Subsection I of the Fact Finder's Act based

on net profits that used to be credited before the 1964 recreation lease. Plaintiffs' credits under Subsection I of the Fact Finder's Act will be in the amount, if any, of the United States' net profits under the recreation lease. The United States must credit Plaintiffs with any net profits the United States might realize from lease revenues it receives from the State, after deducting any recreation lease-related expenses the United States may incur.

THEREFORE IT IS ORDERED that the Federal Defendants' Motion for Summary Judgment (Doc. No. 336) is hereby granted in part and denied in part.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike the State Defendants' Memorandum of Law (Doc. No. 339) is denied.

IT IS FURTHER ORDERED that no later than February 10, 2003, the parties must present a draft of pertinent new provisions to be included in a reformed recreation lease prepared in conformity with the Court's rulings in this Memorandum Opinion. If the parties are unable, after good-faith efforts, to present a mutually acceptable draft, then they must present by February 10, 2003 separate drafts they believe conform to this Court's rulings.

/s/ James A. Parker
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellees.

No. 06-2282

ORDER

(Filed Sep. 16, 2008)

Before **KELLY**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

Appellants' petition for panel rehearing is denied. Appellants' motion for leave to file supplemental appendix is denied as moot.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO; EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 OF TEXAS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; WILLIAM E. RINNE, Acting Commissioner of Reclamation; RICK GOLD, Regional Director of the Bureau of Reclamation; ANITA LOCKWOOD, Secretary of the State of New Mexico; GARREY CARRUTHERS, Governor of the State of New Mexico,

Defendants-Appellees.

No. 06-2282
(D.C. No.
CIV-90-95-JP/KBM)

JUDGMENT

(Filed Aug. 12, 2008)

Before **KELLY**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk